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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 111

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

JAMES F. MASTERSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Third Circuit entered on March 11, 1953.

OPINIONS BELOW

The first opinion of the United States District Court for the District of Delaware (R. 72-83) is reported in 101 F. Supp. 931, and its opinion upon rehearing (R. 83-85) is reported in 106 F. Supp. 687. The opinion of the Court of Appeals (R. 232-233) is reported in 202 F. 2d 638.

JURISDICTION

The decision of the Court of Appeals with respect to which the writ of certiorari is sought was entered on March 11, 1953 (R. 232-233). The jurisdiction of this Court is invoked under 28 U.S.C. 1254, which is made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 838, 15 U.S.C. 79a *et seq.*

QUESTIONS PRESENTED

1. Whether the Commission, in determining fees for services rendered in reorganizations under Section 11 of the Public Utility Holding Company Act, must give conclusive weight to fee agreements between claimants and holding company clients unless those agreements are shown to be unconscionable?

2. Assuming that the Holding Company Act vested in the Commission responsibility for determining the amount of such fees within the area where there may be room for reasonable differences of judgment, does the Administrative Procedure Act permit a reviewing district court, in the guise of appraising the evidentiary significance of the "attorney-client relationship," to transfer the responsibility for judgment from the Commission to the regulated companies?

STATUTE INVOLVED

The following provisions of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U.S.C. 79a *et seq.*) are pertinent:

Sec. 11. * * *

(d) The Commission may apply to a court,

in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any sub-

sidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of inves-

tors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission.

The following provision of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001) is also involved:

Sec. 10. * * *

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted

by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

STATEMENT

This case involves conflicting determinations by the Commission and the court below concerning the amount of an attorney's fee to be allowed in connection with a reorganization proceeding under Section 11(e) of the Public Utility Holding Company Act (15 U.S.C. 78k(e)). The plans proposed the settlement of intercompany claims and the liquidation of North American Light & Power Company ("Light & Power") to comply with an order of the Commission, dated December 31, 1941. A claim was asserted against Light & Power by its former subsidiary, Illinois Power Company ("Illinois Power"), for $26,000,000, and a claim was asserted by certain public preferred stockholders of Light & Power that any obligations to Illinois Power should be paid by Light & Power's parent, the North American Company ("North American"). Early in the proceeding, an appeal challenging the Commission's jurisdiction to hear the Illinois Power claims was dismissed on the ground that the order sought to be reviewed was interlocutory.[1]

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[1] *North American Light & Power Co.*, v. *SEC* (unreported) 2 SEC Jud. Dec. 1331 (C.A. 3, No. 8488, October 14, 1943).

After hearings before the Commission on the claims were completed, briefs and requested findings filed, and the matter scheduled for oral argument, a settlement was reached by the three companies and embodied in a plan. After amendment, this plan was approved by the Commission, and approved and enforced by the District Court. A subsequent plan dealing with other aspects of the liquidation of Light & Power was likewise approved by the Commission and thereafter approved and enforced by the District Court. On appeal, that order of the District Court was affirmed. See *In re North American Light & Power Co.*, 170 F. 2d 924 (1948). Further controversy and litigation determined the allocation of dividends which had been paid during the pendency of the appeal upon certain stock distributable under the plan.

The Commission had reserved jurisdiction over fees and expenses, and the plan which undertook to complete the liquidation, provided:

> Light & Power and North American will pay such fees and remuneration for services rendered and for proper costs as the Commission may approve including those incurred in connection with the matters involved in the settlement of the claims and counterclaims involving Illinois Power (but not including those incurred for the benefit of Illinois Power), and will also pay all other fees and expenses in connection with the liquidation of Light & Power.

After consummation of the plan, various applica-

tions for fees and expenses aggregating $3,064,-478.18 were filed with the Commission. The staff recommended that this amount be reduced to $2,-155,895.96.[2] The Commission, on December 21, 1950, issued a memorandum opinion and order "releasing jurisdiction" with respect to certain fees and expenses not disapproved aggregating $2,-270,650.00 in fees and $141,461.00 in expenses, including $22,590.47 for respondent Masterson which had already been paid (R. 57-60). Action was deferred upon further matters still in dispute, including the balance of Masterson's claim. That claim as well as other deferred claims was disallowed by order of the Commission dated May 7, 1951 (R. 65-68).

The Commission, by supplemental application to the District Court, requested that court to enforce its determination concerning the rejected portion of Masterson's claim and concerning one other rejected claim no longer in dispute. Masterson's objection was sustained by the District Court, which directed the Commission to allow his claim in full. The Commission appealed. The Court of Appeals affirmed the District Court by order dated March 11, 1953.

The services upon which the Masterson claim was based involved acting as junior and local counsel for Light and Power during the latter portion of the evidence-taking hearings before the Commis-

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[2] The applications of claimants other than respondent and the recommendation of the staff thereon are not a part of the record in this Court.

sion.[3] He was retained at a time when Illinois Power was nearing the completion of its affirmative case in support of its claims, and after representatives of the public preferred stockholders of Light and Power had urged that North American should be held accountable for any liability of Light and Power that might be established.

The major protagonists then, and throughout the proceeding, were: counsel for Illinois Power, counsel for public preferred stockholders of Light and Power, counsel representing North American, as the parent holding company and the residual security holder of Light and Power,[4] and the principal attorneys (Clayton E. Kline and his partners) for Light and Power. The substantial compensation awarded these principal counsel is not now in dispute.

Masterson's only tangible contribution to the proceeding as local counsel for Light and Power consisted of (1) arguing (unsuccessfully) in opposition to the motion to dismiss Light and Power's appeal to the Third Circuit from the Commission order authorizing the public preferred stockholders of Light and Power to assert a claim against North American to the extent that Illinois

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[3] See page 11, *infra*.

[4] In addition to the claims by public preferred stockholders of Light and Power on behalf of that company against North American based on the claims of Illinois Power against Light & Power, Illinois Power filed a claim against North American for any liability Light and Power might be unable to satisfy. Subsequently, it filed a direct claim against North American.

Besides its interest in the proceeding in this regard, North American, as the sole remaining stockholder of Light and Power, will receive all of its residual assets upon dissolution.

Power might establish its claim against Light and Power;[5] (2) being present at hearings where Kline was in active charge of Light and Power's interests and at which Kline conducted all of the examination of witnesses on behalf of Light and Power; (3) being present (personally or through an associate) as the sole representative of Light and Power at a number of hearings in which the primary conflict was between counsel for the public stockholders of Light and Power and counsel for North American, and where Masterson, on behalf of Light and Power itself, merely renewed from time to time a procedural objection previously made by Kline, *i.e.*, that to permit this particular line of inquiry would unduly encumber the proceeding. The insignificant contribution of Masterson to the formal record has been reproduced in full and occupies 128 pages (R. 87-196).

In support of his claim for compensation, Masterson relied (1) upon his professional experience as a trial lawyer, which did not include any prior experience in proceedings before the Commission or any substantial reorganization experience (R. 207, 219-220); (2) upon his usual per diem charge, said to be $250 per day (R. 206); (3) upon the number of days when he or his associate attended hearings, at some of which the actual hearings occupied less than an hour (R. 88-196, 213); (4) upon an estimate of days spent in office work and conference, which was made without benefit of actual time

[5] *North American Light and Power Co.* v. *SEC* (unreported) 2 SEC Jud. Dec. 1331 (C.A. 3, No. 8488, October 14, 1943).

sheets (R. 213); and (5) upon an agreement with the client, Light and Power, that a fee of $31,975 would "be mutually satisfactory" (R. 204). The agreement was entered into after the fee hearings but prior to the Commission's decision. The fee thus agreed upon amounted to approximately $150 for each "day" involved. The amount allowed by the Commission, $21,975, amounted to $100 for each such "day".

The Commission's reason for allowing Masterson compensation at a more moderate rate than it allowed to others who had taken a more prominent part in the proceedings was that it regarded his services as "basically unproductive" and "duplicative rather than contributory" (R. 56).

In its first opinion, the District Court cast doubt upon the authority of the Commission to supervise the allowance of fees and expenses to participants in Section 11(e) proceedings, and found that (R. 80-81): "Regardless of what effect should be given to the administrative fiat in the case at bar, or what power there may remain in a District Court under a § 11(e) proceeding to review fees and allowances made by the SEC * * * simple equitable doctrine requires that, after an examination of Masterson's services, the client be permitted to pay him what it thought and thinks is a reasonable and adequate fee of $150 [per day], and not the $100 *per diem* the Commission has announced is sufficient."

The Commission requested a rehearing for the purpose of briefing more fully than in its original application the matter of its fee jurisdiction.

After the rehearing, the District Court issued a second opinion which construed its first opinion as not holding that "the SEC has no jurisdiction whatsoever in setting the fees of counsel who appear before it in a § 11(e) proceeding" (R. 84). The holding as restated was that "under the facts of the case at bar, the SEC did not give full weight to an important factor in setting the lawyer's fee, *i.e.*, the lawyer-client relationship" (R. 84). The order of the District Court, entered on August 15, 1952 (R. 85-86), required the Commission to allow the full amount agreed to by Light and Power as the "client". The first opinion of the District Court deprecates the Commission's thought that "it had intimate knowledge of the 'duplicative' and 'secondary' character of the services"; stresses Masterson's normal per diem charge for court services, the agreement with the client, and the fact that "every party in interest, except the SEC, thought the rate was a reasonable attorney's fee" (R. 79-80), and concluded (R. 81) that it would be deplorable if "the management of a subject company is impotent to agree on lawyers' fees if it be against the pleasure of the SEC. The avowed paternalism of the Commission for security holders, under such circumstances, can have no arrival 'in accordance with legal standards' even under the thesis of the Engineers case." This reasoning was not modified by the opinion on rehearing which states (R. 84): "I do not think my opinion of December 3, 1951, should be changed."

After argument, the Third Circuit entered a

per curiam opinion (R. 232-233) in which it interpreted the District Court's holding as concluding that the Commission exercised its power over fees in a way that was not just and reasonable in awarding less than the amount agreed upon by Masterson and his client. It decided that "the District Court's action was a permissible exercise of its judgment in the performance of its reviewing function and that it should not be disturbed. Cf. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951); *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498 (1951); *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 409, 410 (1952)."

REASONS FOR GRANTING THE WRIT

The decisions below, while assuming that the Holding Company Act gives the Commission some jurisdiction to pass on fees in connection with reorganizations under Section 11(e) of that Act, deny the Commission effective control over such fees to the extent agreed to by a holding company client. In respect of this important class of fees, the consequence is to frustrate the purpose of Congress to vest in the Commission primary responsibility for regulating such fees.

Within an area where there is wide room for reasonable differences of judgment, the Commission's holding is set aside without a determination that it is either arbitrary or in excess of statutory power, and the Commission is required upon remand to approve the precise amount

which the fee claimant and holding company management have agreed upon. The District Court rested its holding on the theory that the Holding Company Act did not sanction such "avowed paternalism of the Commission for security holders" (R. 81) as is involved in differing with management's judgment as to a fee where that judgment was not demonstrably unreasonable. The Court of Appeals held it a permissible exercise of the District Court's judgment to conclude that the Commission had "exercised its power over fees in the way that was not just and reasonable," in so far as the Commission had allowed respondent a fee less than that agreed to by the holding company client (R. 233). This appears to us to involve acceptance of the view of the District Court, and of respondents in the courts below, that the Commission in the exercise of its power to approve reorganization fees could not differ with management on the amount of the fee without finding such abuse on management's part as would have warranted interference by a court of equity in the case of an unregulated company. We believe that this involves a misconstruction of the Holding Company Act. If, as we urge, the Holding Company Act does confer upon the Commission the responsibility for reasonable judgment in this area, it is clear that the Administrative Procedure Act does not authorize reviewing courts to transfer that power to holding company managements. Whether the decisions below rest upon an interpretation of the Holding Company Act or of the

Administrative Procedure Act, a far-reaching issue is involved. The magnitude of this problem in relation to Holding Company Act reorganizations is indicated by the fact that there are presently pending before the Commission fee claims totaling approximately $8,000,000 [6] of which approximately $3,000.000 [7] represent claims of persons retained by the managements of the companies subject to regulation and approximately $5,000,000 represent fees of committees and their counsel and other representatives of public security holders. Five additional Holding Company Act fee cases are pending in the lower courts.

1. When consideration is given to the limited character of respondent's services as additional and local counsel for one of the companies involved in the reorganization and to the absence of any tangible contribution to the reorganization on his part, it is clear that no basis exists for a precise evaluation of the worth of his services. Thus, whether the sum of $21,975 allowed by the Commission or the larger sum of $31,975 agreed upon with the holding company client constitutes a just and reasonable fee is obviously a matter of judgment and policy. Had the fee award now in question been made initially by a district judge in the context of a bankruptcy reorganization under Chapter X of the Bankruptcy Act, we believe that there would be no conceivable basis for an appellate court requiring a district court to in-

[6] In addition, applications are pending for reimbursement of expenses totaling approximately $600,000.

[7] This figure includes a claim of approximately $200,000 by a top holding company.

crease the award in question. In that context, no agreement with the management of the company undergoing reorganization could have limited a district judge's discretion; indeed, the possibility of such an agreement being used even to influence his discretion has been precluded by the Borah Act which makes such agreements illegal in the bankruptcy reorganization field.[8] Nevertheless the holding of the District Court, which the Court of Appeals upheld, sets aside the Commission's award for failure to give "full weight" to the attorney-client relationship and directs the Commission, on remand, to accord the respondent precisely the amount agreed to by the holding company undergoing reorganization.

The District Court refrained from holding that "the SEC has no jurisdiction whatsoever in setting the fees of counsel who appear before it in a § 11(e) proceeding" (R. 84), and the Court of Appeals likewise assumed that the Commission has jurisdiction to approve such fees. However, the only

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[8] 50 Stat. 810, 28 U.S.C. 572a. This Act prohibits agreements in any receivership, bankruptcy or reorganization proceeding between parties in interest or their attorneys for the purpose of fixing the amount of fees. When Mr. Chandler of the House Committee on the Judiciary submitted his report on this bill to the House, he said the following with respect to it: "The bill is self-explanatory, its primary purpose being the prevention of private arrangements by parties or their counsel in receivership or bankruptcy proceedings as to fixing fees payable out of the assets of estates in litigation. Investigations have shown that the practice of permitting such agreements has resulted in the allowance of exorbitant fees, followed by the entry of consent decrees, thereby evading hearings of applications for allowances of compensation and determination thereon in open court after the admission of evidence to sustain every such allowance." (House Report No. 1524, 75th Cong., 1st Sess., August 13, 1937.)

room for Commission fee determination which the District Court opinion appears to recognize is that conceded by respondent below—namely, a power to protect the estate from being injured by a "fraudulent or unconscionable fee payment" with the burden on the Commission to prove its unconscionable character.[9] Since it would usually be impossible for the Commission to sustain such a burden in an area where there is as much room for reasonable differences of judgment as exists with respect to reorganization fees, the effect of the holdings below is to leave the Commission with nominal responsibility for such fees but without any real power to deal with them.[10]

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[9] In his brief before the District Court in reply to the Commission's petition for a rehearing, Masterson stated (pp. 2-3):

> We are willing to assume *arguendo* that, in the light of the Commission's authority to pass upon virtually all aspects of a plan of reorganization under Section 11(e)—subject, of course, to appropriate judicial review—the Commission also has some measure of jurisdiction to inquire into the matter of legal fees which are to be paid out of the assets of the Company undergoing reorganization, in order to ensure that the estate is not being mulcted and its assets drained away through fraudulent, unconscionable or extravagent payments to attorneys and others . . . we do not dispute that a power of surveillance does exist within proper limits.

Masterson took the same position in his brief before the Court of Appeals (p. 28):

> . . . we have been willing to assume *arguendo* that both the Commission and the enforcement court do have a measure of inherent supervisory power to protect the estate from being injured by fraudulent or unconscionable fee payments.

[10] In its brief in the court below, the Commission stated (p. 8):

> We do not argue that the company's agreement to pay Masterson $150 a day rather than the $100 a day which the Commission found his services to be worth was so

This is illustrated by *In re Northern States Power Co.* (unreported),[11] D. Minn., Civil Action No. 2673, January 12, 1953, after the opinion of the District Court herein (appeal pending). In that case, the court rejected the Commission's determinations with respect to the appropriate fee to be accorded to separate counsel who represented two of the holding companies involved. Without citing the prior decision of the District Court in the instant case, the *Northern States* opinion adopted similar reasoning to the effect that the Commission "has failed to give due weight to the contract arrangement between attorney and client." As a necessary consequence of the adoption of that rationale, the *Northern States* decision required the Commission on remand to accord precisely the fees and expenses which each of these counsel requested and which the holding company client approved.

The consequence of the denial of power to the Commission would be less serious if the District Court were undertaking itself to exercise a primary responsibility to curtail reorganization fees in the interest of investors, comparable to that exercised by a reorganization judge in Chapter X proceedings. The decisions below, however, do not involve the assumption of any such role by

improvident as to amount to waste, since the Commission made no such finding. Nor do we argue that an award of the larger amount ordered by the district court would be an abuse of discretion, if the district court were authorized by the statute to approve fees as such, rather than to exercise judicial review over the approval action of the Commission.

[11] Copies are being filed with this petition.

the District Court. Any such judicial undertaking would be impractical since, in its review capacity, a district court is concerned only with objections to what the Commission first decides. The objectors are usually dissatisfied fee claimants and only rarely those seeking to challenge fees allowed by the Commission.

In addition, a district court in a Section 11 case lacks that direct contact with the activities upon which fee claims are based which it acquires through the exercise of its primary jurisdiction to approve plans in a Chapter X proceeding. In the instant case, Masterson's activities before the District Court were limited to attending, without actively participating therein, the hearings on the applications for enforcement of the plan embodying the claims settlement and amended Plan I.[12] Thus, unless the Commission is to exercise an informed discretion to determine fees in Section 11(e) proceedings such as is exercised by other agencies or by courts with primary responsibility for plans of reorganization, there will be no effective regulation of fees in connection with Holding Company Act reorganizations.

2. Prior to the decisions below, the Commission's jurisdiction to approve reorganization fees

[12] The transcripts of the District Court plan enforcement hearings do not record any appearance by Masterson. (This transcript is not included in the printed record.) He testified that he "attended" the hearings, as well as preliminary conferences with the judge for the purpose of fixing hearing dates, and that he reviewed and made suggestions with respect to briefs prepared by Mr. Kline (R. 215-216). His schedule of services sought compensation for 4½ days in respect of court hearings (R. 202).

—*i.e.*, power to require claimants to justify their reasonableness—had been uniformly upheld in the courts and, indeed, its administrative determinations with respect thereto had been only occasionally challenged.[13] The source of that authority has been alternatively attributed to Section 11(e) and 11(f) of the Act. Section 11(e) itself does not mention fees, but the first sentence gives the Commission broad power "in accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or con-

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[13] *Halsted* v. *S.E.C.*, 182 F. 2d 660 (C.A. D.C.), certiorari denied, 340 U.S. 834; *In re Electric Bond & Share Co.*, 80 F. Supp. 795 (S.D. N.Y.); and see *In re Electric Power & Light Corp.* (unreported), S.D. N.Y., Civil Action No. 49-347, December 23, 1952 (appeal pending); and see *In re Columbia Oil & Gasoline Corp.* (unreported), D. Del., Civil Action No. 288, May 18, 1945.

The following are instances in which the Commission has exercised jurisdiction over fees without challenge; *Derby Gas & Electric Corporation*, Holding Company Act Release No. 3236 (1942); *Great Lakes Utilities Company*, 11 S.E.C. 1134 (1942); *North Shore Gas Company*, 13 S.E.C. 139 (1943); *Utilities Employees Securities Company*, 17 S.E.C. 240 (1944); *Columbia Gas & Electric Corporation*, 17 S.E.C. 549 (1944); *The United Gas Improvement Company*, Holding Company Act Release No. 5570 (1945); *Engineers Public Service Company*, Holding Company Act Release No. 7041 (1946); *The Laclede Gas Light Company*, Holding Company Act Release No. 7260 (1947); *Electric Bond and Share Company*, Holding Company Act Release No. 7982 (1948); *Standard Gas and Electric Company*, Holding Company Act Release No. 8745 (1948); *New England Power Association*, Holding Company Act Release No. 8751 (1948); *The West Penn Electric Company*, Holding Company Act Release No. 9410 (1949); *Community Gas and Power Company*, Holding Company Act Release No. 9837 (1950); *The United Light and Railways Company*, Holding Company Act Release No. 10724 (1951); *The Commonwealth & Southern Corporation*, Holding Company Act Release No. 11021 (1952).

sumers" to determine the conditions under which registered holding companies or their subsidiaries may submit plans.[14] The second sentence of Section 11(e) vests in the Commission initial responsibility for determining whether a plan is fair and equitable, and includes responsibility for fees in so far as that responsibility may be regarded as inherent in any determination as to fairness.[15] Section 11(f) expressly deals with fees, and expressly authorizes the Commission to require even in court proceedings "that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission."

In *In re Electric Bond and Share Company,* 80 F. Supp. 795, at p. 798, Judge Knox held that the Commission's "jurisdiction over fees is an inseparable part of the determination of whether a plan is fair and equitable." Other authorities have looked primarily to Section 11(f) as the source of that power. See *Halsted* v. *S.E.C.,* 182 F. 2d

[14] In the *Chenery* cases, the Court recognized the power of the Commission under this sentence, to deal broadly with all activities in relation to the reorganization. *S.E.C.* v. *Chenery Corp.,* 318 U.S. 80, 92-93, and 332 U.S. 194, 201-203. In this case, the plan as approved by the Commission made all fees subject to its approval, and since the Commission's practice of passing on reorganization fees of companies' counsel, as well as others, was established long prior to the services in question, there could exist no problem of retroactivity such as divided the court in the *Chenery* cases.

[15] *Cf. Brown* v. *Gerdes,* 321 U.S. 178; *Leiman* v. *Guttman,* 336 U.S. 1, 9.

660, 663 (C.A. D.C.), certiorari denied, 340 U.S. 834; *S.E.C.* v. *Cogan,* 201 F. 2d 78, 81 (C.A. 9). Irrespective of what might be the proper construction of either Section 11(e) or Section 11(f) if the other provision were not in the Act, the two together give the Commission complete jurisdiction to require that all fees in Section 11 proceedings be subject to its approval whether in respect of activities before the Commission or before the court. This result follows whether the express fee jurisdiction in Section 11(f) itself is construed as extending to all such fees, or merely as intended to make sure that the fee jurisdiction implicit in the Commission's power to deal broadly with the reorganization of holding companies, extends also to the fees of court-appointed trustees, and to fees for activities before the court—fees which might otherwise be subject to initial approval by the district court in the varying capacities mentioned in Section 11(f), *i.e.,* as a bankruptcy or receivership court or as a "court of equity" for purposes of subsections (d) or (e) of Section 11.

3. Once it is recognized that the Commission does have jurisdiction to approve fees in reorganization, there is no reason to assume that the Congress did not contemplate its exercising the broad judgment in this area which has been generally associated with the grant of primary jurisdiction to approve reorganization fees. *Cf. R.F.C.* v. *Bankers Trust Co.,* 318 U.S. 163, 170, dealing with the jurisdiction of the Interstate Commerce Commission to approve fees under the railroad reorgan-

ization provisions of the Bankruptcy Act. The fact that Congress intended the Commission to exercise such responsibility even with respect to the fees of court-appointed officers hardly justifies the concern of the district court lest holding company managements be "impotent" to agree to pay attorneys' reorganization fees which the Commission disapproves (R. 81). Indeed, the legislative background of the Act indicates that the Congress was greatly concerned with curbing the enormous amounts of patronage at the disposal of holding company managements, and particularly desirous that the extensive reorganizations which would be required under the Act, should not serve merely to give a fresh occasion for exploitation by the then greatly distrusted holding company managements.[16] Thus the Power Policy Committee referred to the desirability of protecting "the average investor from the exploitation threatening him almost as a matter of course under our usual methods and mores of corporate reorganization * * *. The dominant groups who have ruthlessly plucked the investors in promoting some of these huge holding companies must not be allowed to pluck him again as reorganization managers."[17]

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[16] It was recognized "that the concentration of control in the electric and gas industries through the device of the holding company has assumed tremendous proportions." This enormous control over other peoples' money was characterized as "private socialism" and wasteful as well as contrary to the public interest. See the report of the National Power Policy Committee on Public Utility Holding Companies appended to Senate Report No. 621, 74th Cong., 1st Sess., pp. 55-60.

[17] *Id.*, at p. 58.

The Senate Committee, in reporting out the bill, referred to it as giving the Commission "the complete supervisory power which is essential to the elimination of the present wasteful practices in corporate reorganizations." [18]

4. In holding that "the District Court's action was a permissible exercise of its judgment" which should not be disturbed, when it concluded that the Commission "exercised its power over fees in the way that was not just and reasonable," the Court of Appeals relied upon "*Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474 (1951); *National Labor Relations Board* v. *Pittsburgh Steamship Co.,* 340 U.S. 498 (1951); and *National Labor Relations Board* v. *American National Insurance Co.,* 343 U.S. 409, 410 (1952)" (R. 233). We can assume, arguendo, that the *Universal Camera* rule applies to the type of decision

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[18] Senate Report No. 621, at p. 33. The same report (at pp. 16-17) referred to the purpose of the bill as to obtain for holding company security holders—"not what is left [of dividends] after high salaries, large fees, bonuses to holding-company officers and bankers, and the purchase of securities at exorbitant prices from corporate insiders" but "all the legitimate cash dividends the operating company can pay." See also 79 Cong. Record 4607 (March 28, 1935), where Senator Wheeler stated:

> That brings me to the last point—the protection of the holding-company investor by the Securities and Exchange Commission. I do not blame the average investor for shuddering at the very word "reorganization". In the usual process of reorganization and regrouping of properties the investor might be given the same milking by reorganizing bankers and their lawyers that he has had to take in railroads, real estate, and every other kind of corporate reorganization. To meet that danger the bill puts the entire process of reorganization, including fees and so-called "reorganization plans", under the control of the Securities and Exchange Commission.

involved here. In this case, however, there was no real dispute before the Commission as to what respondent did. The problem was to value those services in relation to the evidence concerning the combined accomplishment in the reorganization, and of what others contributed to that accomplishment. The courts below did not even undertake to determine this value independently, but held merely that the Commission was not warranted in disregarding the bargain between the fee claimant and his holding company client.[19] That agreement, if evidence at all, was only evidence of private opinion upon the ultimate question which Congress directed the Commission to determine.

To sustain the action of the District Court, is to hold that the agency judgment may be set aside by a reviewing district court without interference on appeal, if there is evidence of a particular sort which conflicts with the agency holding, however reasonable or however otherwise substantially supported by the record as a whole.[20] In addition, it

[19] The gist of the District Court's holding, as stated in the memorandum on rehearing, "is simply, under the facts of the case at bar, the SEC did not give full weight to an important factor in setting the lawyer's fee, *i.e.*, the lawyer-client relationship" (R. 84).

[20] We are not clear from the opinion of the Court of Appeals whether it agreed with the District Court that the Commission was required to accept the combined opinions of respondent and his holding company client as to the appropriate fee or merely held that a determination to that effect by the District Court could not be disturbed on appeal. On either interpretation, however, the holding leaves no room for exercise by the Commission of the power to approve fees within the area where there may be room for reasonable differences of judgment, which we believe was vested in the Commission by the Holding Company Act.

disregards that part of the *Universal Camera* holding which reaffirms the traditional functions of agencies within their specialized fields including the right to choose "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." See 340 U.S. 474, 488. See the companion decision in *O'Leary* v. *Brown-Pacific-Maxon, Inc., et al.*, 340 U.S. 504, holding that the issue of whether a death arose out of and in the course of employment within the meaning of the Longshoremen's and Harbor Workers' Compensation Act was a question of fact for administrative determination because the relevant "standards are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as 'questions of law' " 340 U.S. at 507-508. These holdings leave undisturbed the prior decisions of this Court as to the respect to be paid to the exercise of administrative judgment within the areas in which Congress has delegated policy decisions to the agency. See *S.E.C.* v. *Central-Illinois Corp.*, 338 U.S. 96, 126-127. Unless, contrary to our view, the approach of the District Court is consistent with the proper interpretation of the Holding Company Act, it plainly cannot be supported by the provision in the Administrative Procedure Act that judicial review extend to "the whole record."

It was argued in the courts below that the matter of the worth of an attorney's fees is peculiarly

a matter of judicial rather than administrative expertise, that changes in Commission personnel between the time when the services were rendered and the fee award detracted from the Commission's ability to appraise the services involved in the instant case, and that the particular district judge was unusually experienced in cases involving Section 11(e) of the Holding Company Act. As to that respondents relied upon the holding of the Ninth Circuit in *S.E.C.* v. *Cogan,* 201 F. 2d 78, 86, which frankly emphasized the special expertise of judges with respect to matters relating to attorneys' conduct.[21] But we submit that the question is not to be resolved upon the basis of confidence, or lack of confidence, of the judiciary in administrative, rather than management, judgments with respect to attorneys' fees. As we have shown above, Congress concluded to rely upon an administrative judgment in this area, and, in so far as it thought that the administrative approach might differ from the judicial approach, was prompted by a hope that the Commission might be sparing in its fee allowances by comparison with prior judicial reorganization practice.

Moreover, if the allocation of responsibility between the Commission and the courts is to be

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[21] The Commission obtained an extension of time to consider whether it should file a petition for a writ of certiorari to review that decision in connection with the decision in the instant case. Despite disagreement with the reasoning of the Ninth Circuit, the Commission has concluded not to seek review of that decision in view of the possibility that the holding may be limited to a narrow question concerning the conduct of the individual attorney involved in that case.

based upon a comparative determination of abilities to evaluate reorganization fees, this Court has already observed, in *R.F.C.* v. *Bankers Trust Co.*, 318 U.S. 163, 170-171, that

> No question is made as to the competency of the Interstate Commerce Commission to appraise evidence and to draw an informed and intelligent conclusion as to what is a maximum reasonable compensation for services rendered. Indeed, since most of the services are performed in connection with its activities it is probably in a better position to judge of their value to the reorganization than any court or other fact finding instrumentality.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

ROGER S. FOSTER,
General Counsel,
Securities and Exchange Commission.

JUNE 1953

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No. 111

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In the Matter of

NORTHERN STATES POWER COMPANY
(Delaware)

NORTHERN STATES POWER COMPANY
(Minnesota)

Civil No. 2673

ORDER

This proceeding relates to the allowance of fees and expenses in connection with the dissolution of the Northern States Power Company (Delaware) pursuant to Sections 11 (e) and 18 (f), Public Utilities Holding Company Act of 1935. After the consummation of the plan and the related proceedings affecting the Northern States Power Company (Minnesota), the direct subsidiary of the Delaware Company, all participants were requested to file their claims for fees and expenses with the Commission. The total amount requested aggregated approximately $850,000 for fees and $115,000 for expenses. Allowances to be paid by the estate were made between $490,000 and $495,000 for fees and some $103,000 for expenses. Six claimants filed objections challenging the findings of the Commission with respect to their allowances. They are as follows:

A. Louis Flynn, as counsel for the Delaware Company, requested fees of $135,000 in his original petition for services to December 31, 1948, and by a supplemental petition requests fees of $11,000 for services from the latter date to January 31, 1950, and from that date on, a claim for services rendered at the same rate as the services theretofore rendered. He claimed expenses in the sum of $9,725.53 to January 31, 1950. He was allowed a fee of $125,000 as compensation for all services rendered to January 31, 1950, and subsequent thereto, and allowed $9,725.53 for expenses to January 31, 1950, and for any expenses incurred thereafter in connection with the proceedings not to exceed $750.

G. Aaron Youngquist, as counsel for the Minnesota Company, filed a claim for $54,000 for services rendered and $2,338.70 for expenses incurred to January 31, 1950, plus an additional amount for services and expenses thereafter. The Commission allowed him $40,000 for all services rendered to January 31, 1950, and subsequent thereto, and authorized the payment of expenses incurred subsequent to January 31, 1950, in connection with the proceeding in an amount not to exceed $375.

Clarence McMillan, who appeared on behalf of two preferred stockholders and made a one-day appearance in connection with the proceeding, filed a claim for $15,000 for fees and expenses in the total sum of $16. His request for fees and reimbursement of expenses was denied.

Barron, Rice and Rockmore, appeared as attorneys for certain Class A common stockholders in the Delaware Company. They claimed a fee of $25,000 for their services and $1,240.77 for expenses. By a supplemental petition they claimed $243.35 additional for expenses. They were allowed $15,000 for fees and $1,240.77 for expenses. The supplemental petition for expenses was denied.

Sullivan and Worcester appeared as attorneys for a stockholder who held 1,100 shares of the Delaware Company Class A common stock. They requested a fee of $30,000 plus expenses. They were allowed a fee of $15,000 and reimbursement of the expenses incurred.

Standard Gas and Electric Company formerly held substantially all of the Class B common stock (729,083 shares of 729,166 shares) and 11,600 shares (3.4 per cent) of the Class A common stock of the Delaware Company. Two law firms and a securities analyst participated in these proceedings in its behalf. The Commission fixed the fees of counsel in the sum of $85,000 plus certain cash disbursements, but ordered that the allowance of the fees and certain of the expenses should not be paid by the Delaware Company, but should be paid by Standard itself. Neither Standard nor its counsel object to the amounts allowed, but challenge the finding of the Commission that the estate should bear no part of its legal services in this proceeding. Standard has paid the fees which were allowed and now seeks reimbursement in this proceeding.

The following appearances were made:

Mr. Myron S. Isaacs and Mr. Robert S. Keebler, of Washington, D.C., for the Securities and Exchange Commission;

Mr. A. Louis Flynn, of Chicago, Illinois, in his own behalf and also for Northern States Power Company (Delaware) and its subsidiaries;

Mr. G. Aaron Youngquist (of Messrs. Fowler, Youngquist, Furber, Taney and Johnson), of Minneapolis, Minnesota, in his own behalf with respect to his claim and also for Northern States Power Company (Minnesota);

Mr. Clarence McMillan, of New York City, in his own behalf;

Mr. Bernard S. Barron (of Messrs. Barron, Rice and Rockmore), of New York City, in his own behalf;

Mr. Robert B. Luick (of Messrs. Sullivan and Worcester), of Boston, Massachusetts, in his own behalf;

Mr. Paul D. Miller (of Messrs. Mudge, Stern, Williams and Tucker), of New York City, for Standard Gas and Electric Company.

This is a so-called Section 11 (e) proceeding and there is no specific provision therein which clothes the Commission with jurisdiction to determine and fix fees and expenses in such proceeding. But it seems reasonably clear that, with the right to determine whether the plan is fair and equitable, there necessarily must be the right to determine whether the fees and expenses incurred in the proceeding are fair and reasonable. Otherwise, an apparently fair and equitable plan, saddled with exorbitant or excessive fees or expenses, might be rendered entirely futile. Indeed, a depreciation of the assets of the reorganized company by excessive fees could well render the plan inequitable and unworkable. Moreover, the Commission's order of January 30, 1948, approving the plan expressly reserved jurisdiction with reference to the determination of fees and expenses to be paid by the estate, and the Court in its enforcement order provided,

> "(e) The Delaware Company shall pay or make provision for the payment of such fees and reimbursement of such expenses incurred in connection with the Plan, the transactions incident thereto, and the consummation thereof, as are approved, allocated, or awarded by order or orders of the Commission, and having made such payment or provision and having made the distributions and payments provided for in this paragraph (6), the Delaware Company shall transfer its remaining assets, if any, to the Minnesota Company, without consideration. In the event that the amount of such fees and disbursements approved, allocated, or awarded by such order or orders of the Commission shall exceed the amount of the cash of the Delaware Company available for the payment thereof, the Minnesota Company shall pay such excess."

Considerable support may be found for sustaining the Commission's jurisdiction to determine fees and expenses in an 11 (e) proceeding from the entire framework of the Public Utilities Holding Company Act, particularly Section 11 (f). See Halsted v. S.E.C., 182 F. 2d 660. But the basic jurisdicition of the Commission herein sufficiently appears from the purposes and objects of an 11 (e) proceeding.

Probably the more difficult question arises as to the scope of the jurisdiction of the Court in passing upon these objections to the findings of the Commission on the fees to be allowed. Concededly, the Court must recognize and give due weight to the experience and opportunity which the Commission has for fairly appraising applications for fees in such a proceeding. The Commission urges, and this Court recognizes, that where there is substantial evidence to support its findings, and if they were arrived at according to legal standards and are not so arbitrary and unreasonable so as to shock the conscience of the Court, then its decision as to fees should be approved. That the scope of the Court's jurisdiction in reviewing the Commission's findings in an 11 (e) proceeding is fairly narrow has recently been settled in S.E.C. v. Central-Illinois Corp., 338 U.S. 96, subject, however, to the caution as announced in Universal Camera Corp. v. Natl Labor Relations Board, 340 U.S. 474, 490, that all conventional judicial functions are not to be abdicated in reviewing orders of an administrative agency.

It may be noted that, before applications for allowance of fees and expenses were lodged with the Commission, the Public Utilities Division

suggested to the Delaware and Minnesota companies that they endeavor to reach agreements with the various claimants as to the amount of fees and expenses and then make a recommendation to the Commission as to the amount of fees and expenses which should be allowed. This was done. The claimants, or at least many of them, conferred with the companies, and after due investigation by the companies, a complete report covering some 85 pages, and with a detailed review of the claimants' services and the companies' recommendation, was submitted to the Commission.

The several objections will be considered in the order referred to above.

A. Louis Flynn

Mr. Flynn acted as attorney for the Delaware Company and its subsidiaries throughout this proceeding. His showing indicates that up to January 31, 1950, his office devoted some 6,128 hours to the proceeding, and of that number some 4,739 hours represented his personal time. In justifying its treatment of his claim, the Commission found that an appreciable part of the time spent and services rendered by him was ineffectual in conferring upon the estate or the security holders any benefit. Among other matters, it refers to his alleged unsuccessful efforts in opposing the application for a list of preferred stockholders to the Preferred Stockholders Committee, his unsuccessful opposition to the entry of an order under Section 11 (b) (2) of the Act before the Commission and on appeal, his alleged opposition to "certain accounting adjustments", his opposition to the reopening of the record to reconsider the first amended plan, and the alleged duplication of services as between him and Mr. Youngquist, attorney for the Minnesota Company.

At the outset, it must be noted that all of Mr. Flynn's services were performed as counsel for the Delaware Company and that that which he did as counsel apparently carried out the views and policies of his clients. He was not a volunteer in this proceeding, whose services should be strictly appraised by the contributions made to the formation, development and consummation of the plan. Both the Delaware Company and the Minnesota Company recognize that the services related in Mr. Flynn's claim were performed at the request of the respective companies. If some of the services rendered were, in the view of the Commission, unsuccessful steps taken with respect to certain issues raised in the proceeding, Mr. Flynn was nevertheless performing such services at the instance of his clients. Both companies have filed statements in which they approve his fee application. There is no contention or showing by the Commission that the amount claimed by Mr. Flynn is unreasonable in view of the legal services which he actually performed. There is no testimony which contradicts or questions the number of hours devoted to the proceeding or the reasonableness of the hourly rate requested by him. His skill and experience are not controverted. Concededly, the questions involved in this proceeding and affecting these companies were intricate, novel, and required high legal skill. It is not surprising, therefore, that the companies' views and policies in carrying out the apparent purposes and objects of the proceedings did not conform at all times to the Commission's views. To attempt to effect compliance with the Act necessarily presented difficult problems. Whether all of the companies' decisions, therefore, proved to be ultimately right or wrong, they were entitled to legal assistance and advice in doing that which they

determined to be compatible and in furtherance of the objects of the proceeding. If legal counsel engaged by these companies, and in carrying out their wishes, are to have their legal fees subjected to the arbitrary rule that, unless the services rendered are ultimately proved to be in furtherance of the policies and plan finally approved by the Commission and the Court they will be disallowed, it would be hazardous indeed for any counsel to accept employment under such circumstances. There is no contention by the Commission that the fees, if allowed as requested and approved by the companies, will affect in any way the fairness or equitableness of the plan, or that the payment will impose any unreasonable financial burden upon either the companies or their security holders. In the findings and opinion of the Commission, the following comment appears anent Flynn's claim,

> "Flynn acted as counsel to the Delaware Company and its subsidiaries throughout the proceedings, advising management with respect to all legal problems, drafting and presenting the various plans filed by the Delaware Company and taking a major part in all matters connected with the evaluation and presentation of such plans and the consummation of the plan finally approved. * * *
>
> "From the commencement of the proceedings Flynn was charged with complete direction and supervision of all legal matters for the Delaware Company. During a substantial part of the proceedings he also acted on behalf of the Minnesota Company. * * *
>
> "Although we recognize, as Flynn has stated, that his opposition at various stages of the proceedings reflected the views of the management, in determining what allowance should be awarded him in these proceedings, consideration must be given to the fact that his activities included unsuccessful opposition to such appropriate steps as the making of the accounting entries and the furnishing of the stockholders' list. While Flynn's services contributed to the formulation, development and consummation of the Section 11 (e) plan, his activities were devoted in large measure to supporting plans which proved unsatisfactory, and as a result the laboring oar in carrying through the plan as finally consummated passed from company counsel to various counsel for the common stockholders of the Delaware Company. Such counsel performed considerable services which might otherwise have been performed by company counsel and for which, as we note below, substantial compensation is properly allowable out of the reorganization estate."

Although it may be true that some of Mr. Flynn's services were performed in the furtherance of plans and policies which the Commission did not support, and this led to greater activity on the part of counsel for the common stockholders, no one questions the good faith of Mr. Flynn in performing the services which his clients authorized him to perform. Under such circumstances, it would be an anomalous situation if sanction were not given to the contract between the parties. The Commission apparently recognized that in determining the amount of compensation to be paid to counsel for the company which is subject to the 11 (e) proceeding, "the services rendered by such counsel for that purpose need not be measured by the results obtained where their proposals are reasonable." If that is the criterion to be applied -- the reasonableness of

the proposals made -- in evaluating Mr. Flynn's services and in determining whether his claim should be approved, the record does not sustain the Commission in its conclusion that his fee should be cut some $21,000 for services rendered to January 31, 1950, and that no allowance should be made for services rendered thereafter. At best, the Commission's action is an arbitrary reduction which it determines at this time based upon its conclusion that, in the retrospect, it appears that some of the efforts of counsel in behalf of its client were not reasonable. Under such circumstances, there is always the tendency to substitute hindsight for foresight.

In a long and involved proceeding of this kind, there is bound to be duplication of some of the services rendered, and some tactical moves which at the time seemed reasonable and for the best interest of the companies involved now may seem ill-advised in light of the events that have taken place. It may not be amiss to point out that the Commission itself spent a great deal of time and effort on the first amended plan, and later it was required to confess that it erred in its approval. Moreover, it seems quite evident in reading the Commission's opinion that it proceeded to evaluate Mr. Flynn's services substantially in the same way as it would evaluate the services of a volunteer who necessarily must have his remuneration limited to the actual contribution that he made to the formulation and consummation of the plan of reorganization. It seems to the Court that, if one accords due weight to the contract arrangements between attorney and client and recognizes the approval and ratification by the client of the services rendered and gives due weight to the amount of time expended by this applicant and the experience and skill of counsel, the allowance accorded to him by the Commission should not be sustained. The Court is fully cognizant of the weight which generally should be given to the Commission's findings where the appraisal of the value of the attorneys' fees is involved in a reorganization proceeding, and the Court also recognizes that there may be instances where the contract arrangement between the company in reorganization and its attorney should yield to the exigencies of the reorganization which must meet the standards of being fair and equitable. But that situation does not exist here. If the Delaware Company has insufficient funds to pay Mr. Flynn's claim, the Minnesota Company stands ready, willing and able to pay the deficiency. The Court determines herein that, in light of this record, the Commission has failed to give due weight to the contract arrangement between attorney and client and to all the attendant circumstances, and I conclude that the findings of the Commission with respect to Mr. Flynn's fees were not arrived at in accordance with appropriate legal standards. It follows, therefore, that Mr. Flynn should be accorded the fees and expenses which he requests and which his clients have approved.

G. Aaron Youngquist

Mr. Youngquist, as a member of the firm of Messrs. Fowler, Youngquist, Furber, Taney and Johnson, acted as general counsel for the Minnesota Company throughout these entire proceedings. He asks no payment from the Delaware Company. Any remuneration which he receives for legal services will be solely from his client, the Minnesota Company, for which he was acting in attempting to protect its interests and rights so far as they might be affected by the liquidation of the Delaware Company. The services which he performed were at the request of his client. The Minnesota Company, and the Delaware Company

as well, are satisfied with Mr. Youngquist's bill and have approved his fees and expenses as requested. That which the Court has stated with respect to Mr. Flynn's claim is particularly apposite here. All of Mr. Youngquist's services were rendered in connection with this proceeding. There is no showing that that which he did was not performed at the behest of his client in good-faith efforts to safeguard and protect its interests in this liquidation and dissolution. The fact that Mr. Youngquist and Mr. Flynn collaborated and that there may be some duplication of effort does not, on this record and in view of the contract relation between Mr. Youngquist and the Minnesota Company, militate against the reasonableness of the compensation to be allowed him. The Minnesota Company is satisfied that any duplication should not deprive him of the fee requested, and the fact that Mr. Youngquist and his client may have differed with the Commission or the Court with respect to many of the complex issues and questions involved should not affect his right to reasonable compensation. No one questions the reasonableness of the fees for the services actually performed, and obviously they cannot be characterized as being so unreasonable that good conscience requires their denial. As observed in connection with the Flynn claim, the mere fact that certain proposals advanced by the Minnesota Company were not adopted or may not seem reasonable now, should not deprive counsel of compensation for services rendered at the request of his client. For aught we know now, the so-called advance earnings estimate proposed by Mr. Youngquist for his client, as well as other proposals made by them, may prove to be more sound in the future than that which was adopted by the Commission and approved by the Court. There is not the slightest showing or contention that the payment of Mr. Youngquist's bill will affect in the remotest degree the fairness or equitableness of the plan of reorganization involved herein. The Commission has failed to give due weight to the contract relation between attorney and client, and in view of all the attendant circumstances, its findings and conclusions with respect to Mr. Youngquist's claim cannot be sustained as complying with appropriate legal standards and is not a fair and equitable disposition of this claim. The Court finds that the fees and expenses as requested and approved by the client should be allowed.

Clarence McMillan

As stated, Mr. McMillan represented two preferred stockholders who owned 250 shares of the preferred stock of the Delaware Company. He appeared at the initial hearing on July 8, 1942, and advanced the theory that sound principles in reorganizations under the Bankruptcy Act required that allocations be made on asset value rather than prospective earnings. His oral appearance was very brief and he filed a four-page memorandum to support his views. He never appeared again, nor did he participate in any way thereafter in the hearings or proceedings; in fact, his next appearance was at the fee hearing some seven and one-half years later. He requests a fee of $15,000 and $16 by way of expenses. The Commission found,

> "We have carefully reviewed the services of this claimant and have concluded that no contribution resulted from his limited participation. We cannot find that under the circumstances either his suggestion that the distribution to the preferred stockholders should be based on asset values, or his mere assertion that the plan should provide for payment

of accrued dividends out of cash or in the form of additional Minnesota Company stock if cash was not available, was of a nature to constitute a compensable benefit to the estate. The former was without merit and the latter was not substantially different from assertions made to this Commission by a number of other preferred stockholders."

In these views of the Commission, the Court on this record is in complete accord. The objections are overruled and the claim is denied.

Barron, Rice and Rockmore

This firm represented some 70 stockholders owning 24,750 shares of Delaware Class A common stock. Their showing in support of their claim for fees indicates that a total of 1,590 hours were devoted to these proceedings, and of that time, 1,380 hours represented time spent by Bernard S. Barron, a senior member of that firm. The fee requested was $37,500. At the request of the Public Utilities Division of the Commission, the company conferred with various counsel who had filed claims for fees and expenses in order to see whether an agreement could be reached as to the amounts to be paid to the various fee claimants. Mr. Barron of this firm complied with this request and made a trip to Minneapolis from New York for that purpose. He presented his claim in person to the representatives of the companies, and after a hearing, they filed a detailed report and recommended a fee of $25,000, which Mr. Barron agreed to accept. The Commission, however, in passing upon this claim, reduced it to $15,000, stating, in part,

"The Barron firm filed objections to the enforcement of the First Amended Plan with the District Court, contending that the foreseeable earnings of the Minnesota Company were approximately $8,215,000 rather than $6,500,000 as had been estimated by us. 14/ Barron together with other counsel supported the Commission's application for a continuance of the enforcement proceedings, and thereafter participated in all the hearings before us and the court, cross-examined witnesses, filed memoranda and briefs, participated in oral argument, and proposed a modification of the Biewend-Johnson Plan, which was one of the alternative plans submitted after the hearings were reconvened. He opposed the Second Amended Plan filed by the Delaware Company but subsequently supported our application for enforcement of the Second Amended Plan, as modified. The record indicates that the services of the Barron firm contributed to the proceedings and the development of the plan as finally approved and to the increased allocation for the Class A stockholders.

"Under all the circumstances, including the duplication of effort referred to above, we think that a fee of $15,000 is reasonable compensation for the services rendered and the contribution made by this claimant.

"14/ The Barron firm joined with the Delaware Company in opposing the application of the Foster Committee for authority to solicit authorizations from the preferred stockholders."

The Commission also pointed out that there were at least three groups of attorneys for Delaware Class A common stockholders who were allowed an aggregate fee of some $170,000. $140,000 went to the firms representing the so-called Lehman group. Apparently the attorneys for this latter group assumed the laboring oar after Mr. Barron's firm had taken the initiative for the Class A common stockholders in objecting to the approval of the first amended plan. Everyone recognizes that the attorneys for the Lehman group made the most effective and constructive contribution to the formulation and ultimate adoption of the final plan. But, notwithstanding, the record will not justify such a substantial cut in Mr. Barron's claim which the Commission has made upon the basis of duplicitous services. The duplicitous services referred to pertain to the several groups who were representing Class A common stockholders and which were all motivated in obtaining the most favorable allocations for this group. Undoubtedly there was some duplication, which is inevitable in a proceeding of this kind, and the mere fact that duplication exists does not justify such a substantial reduction as was accorded the Barron firm. Moreover, it appears that, when the attorneys for the Lehman group did assume the major task of representing the Class A stockholders, the Barron firm voluntarily reduced its participation in the proceeding accordingly. The relegation of the Barron group to $9.43 an hour is not fairly justified by the record. The Lehman group were accorded an allowance of $24.48 an hour. The disparity between the compensation allowed Mr. Barron and other counsel for Class A stockholders is not consonant with fair and equitable consideration and does not find sufficient support in the record to justify the approval of the Court. True, there is bound to be disparity in the hourly rates accorded to various fee applicants, and the mere existence of such disparity is not sufficient ground for finding that the one accorded a less hourly rate has been treated unfairly. Many other factors must be considered. Attorneys in such proceedings as volunteers may put in a large number of hours but the ultimate contribution to the results may be relatively unsubstantial and their allowances must be appraised accordingly. But, in light of this record, the Court is constrained to find that the contribution of the Barron firm cannot in good conscience be approved at $9.43 per hour. Recognizing the weight that should be accorded to the findings of the Commission by reason of its association with these proceedings, nevertheless it should be remembered that this Court by reason of the lengthy hearings on the enforcement of the plan, is also acquainted with such of its background and history and cannot entirely abdicate its prerogatives in reviewing much fee allowances and must determine whether or not the findings of the Commission are consonant, in light of fairness and equity, with the legal standards which should be applied. It is my view that a fee of $23,850 should be allowed this firm for the services performed and the contribution which it has made to these proceedings. This sum is less than the amount approved by the companies and in light of all the circumstances should accord this claimant fair and equitable compensation. It follows, therefore, that the fee of this firm is fixed in the sum of $23,850.

There is, in addition, the expense item of $243.35, which was allegedly incurred by Mr. Barron in making a trip to Minneapolis at the request of the Commission in order to determine whether the company and this claimant could agree upon the reasonableness of the fees to be paid. It would seem that such expenses were incurred for the purpose of contributing to and aiding the

Commission in its problem in passing on the matter of fees. Such expenses should be distinguished from the ordinary expenses which a claimant incurs of his own volition in presenting his claim to the Commission or to the Court for fees and expenses. Here, we have a situation where the expenses which were incurred arose by reason of the request of the Commission, and in carrying out one of the processes adopted by the Commission in the fulfillment of its duty in an 11 (e) proceeding. These expenses should be allowed, and it is so ordered.

Sullivan and Worcester

This firm represented Cameron Biewend, who held 1,100 shares of Delaware Class A common stock, and its services began as counsel in February, 1946. The Commission points out that it "thereafter participated actively both before us and the court." Its application for fees indicates that some 1,496 hours were devoted to these proceedings. Fees in the sum of $30,000 were requested. The companies, however, after investigation, recommended a fee of $22,500. The Commission allowed a fee in the sum of $15,000. In passing upon the fees to be allowed this firm, the Commission found that

> "Shortly after it was retained by Biewend, Sullivan & Worcester filed with the District Court a statement of objections to the enforcement of the First Amended Plan and filed with us a motion to reconvene hearings to receive new evidence. Biewend, a security analyst, began formulating an alternative plan, and, after the Lehman Plan was submitted to us, he communicated with Christian A. Johnson, who was also interested in the proceedings because of his ownership of Standard's $4 preferred stock, and together they formulated and submitted a plan known as the Biewend-Johnson Plan. At the reconvened hearings both testified in support of this plan and by their testimony attempted to show that the Minnesota Company's annual foreseeable earnings would exceed $8,000,000. This testimony was contributing factor in inducing us to vacate our order approving the First Amended Plan.
>
> "Sullivan & Worcester, as Biewend's attorney, rendered efficient and able service. They presented direct evidence through the testimony of Biewend and Johnson, cross-examined other witnesses, filed briefs and presented oral argument. They were partially responsible for the reopening of the proceedings, the rescission of our order approving the First Amended Plan and for securing a more favorable allocation for the Class A stockholders.
>
> "Under all the circumstances, including the duplication factor referred to above which is also applicable to the services of this claimant, we are of the opinion that a fee of $15,000 will adequately compensate these attorneys for their services."

The only factor mentioned by the Commission as motivating it in reducing this fee to $15,000 was the "duplication" factor. Undoubtedly as indicated heretofore, the duplication factor is an important circumstance in determining the fees to be allowed when there are several different firms of attorneys representing various holders of the same class of security. But, as indicated

heretofore, the duplication in a proceeding of this kind is inevitable and is not necessarily an unmixed evil. It may be doubted that the Commission would have reversed itself on the first amended plan had it not been for the rather persistent and active representation and opposition of the various security holders holding the Class A common stock. Allowances in a proceeding of this kind must meet the standard of just compensation so that attorneys will be willing to participate actively and render a valuable contribution to such a proceeding and await the consummation of the plan before any remuneration is obtained. As to the present applicants, nearly seven years will have elapsed before they have obtained the final payment on the allowance which is to be made to them. Granted that it is difficult to determine just what reduction should be made where there is the duplication factor, and granted also that reasonable minds may well differ as to this problem, nevertheless, the reduction here seems too drastic in light of all the circumstances and does not square with the Court's understanding of just and equitable compensation. The hourly rate which the Commission allowed is upon the basis of about $10 per hour. The observations made by the Court anent the claim of Messrs. Barron, Rice and Rockmore are pertinent here as to the reasons which persuaded the Court in modifying the Commission's finding as to the allowance to be made. My view is that an allowance in the sum of $20,000 is fair and reasonable and the fees of this firm are fixed in that sum.

The only other phase of the objection made by this firm which requires any particular comment pertains to the item of $3,800 which this firm received from Biewend, and which amount the estate reimbursed Biewend by requiring a refund to him from interim fees paid to this firm. In effect, therefore, the $3,800 received by counsel from Biewend was money from the estate, and in order to make up the $15,000 allowed by the Commission's order of April 8, 1952, a $12,500 interim payment having been made, the net amount to this firm in the Commission's amended order of May 15, 1952, was the sum of $2,500. Counsel contend that the Commission erred in requiring them to repay Biewend the $3,800 which he had advanced in three sums: $1,000 in 1946; $1,800 in 1947; and $1,000 in 1948. They contend that they credited these sums to him as a retainer and reflected these sums in their income tax statements for these years. But these moneys were correctly noted in their income tax statements as fees. The mere fact that Biewend may have made a notation in his claim that he advanced these moneys as expenses to the attorneys is not controlling, and as a matter of bookkeeping, the fees received by this firm which the estate paid, or will pay, according to the Commission's findings, are as follows:

$1,000	in 1946 (from Biewend)
1,800	in 1947 (from Biewend)
1,000	in 1948 (from Biewend)
8,700	in 1950 ($12,500 was paid to Sullivan & Worcester but $3,800 was ordered to be refunded to Biewend)
2,500	by order of the Commission of April 8, 1952, as modified May 15, 1952
$15,000	

If it is clearly borne in mind that the fees of this firm received in 1946, 1947 and 1948 from Biewend are moneys which ultimately came out of the estate by reason of the refund to Biewend of such sums, then there should be no confusion in recognizing that the Commission's order with respect to the refund to Biewend in the sum of $3,800 must be approved. It follows from the foregoing that the balance due Sullivan and Worcester for legal services rendered in this proceeding is $7,500.

Standard Gas and Electric Company

Two law firms and a security analyst participated actively in these proceedings in behalf of the Standard Gas and Electric Company. The Commission found that these claimants rendered valuable services and that the amount of $40,000 requested by attorneys Miller, Mack and Fairchild was reasonable and that the payment for the legal services to Guggenheimer and Untermyer should be limited likewise to $40,000, plus reimbursement of their expenses. However, as stated, it was further ordered that these sums should not be paid by the Delaware Company but by Standard itself. It now appears that Standard has paid these sums to the claimants and seeks reimbursement of the amount paid. Primarily the determination of the Commission that Standard should pay the fees for its own counsel was bottomed upon the following premises.

> "We think that the claims in question should be satisfied by Standard without any contribution by the Delaware Company. The Act was enacted to rectify various abuses and uneconomic situations resulting from the use of the holding company device in the public utility field. Holding companies were charged with a statutory duty of bringing their systems into compliance with the standards of the Act and we believe that they should bear their own costs incurred in connection with system proceedings for effecting such compliance rather than shift such costs to the subsidiaries. In the present case Standard, though its position as a holding company over the Delaware Company ceased in 1941, was the parent of the Delaware Company when the complexities were created which we found were required to be eliminated under the Act and which the plan was designed to eliminate. Standard was responsible for those complexities and thus for the necessity of these proceedings. Equity demands that its fees and those of counsel representing it or its stockholders should be borne by it alone, and not by the Delaware Company."

In addition, however, it is urged that the Commission's order should be sustained because although Standard held two classes of stock whose interests were adverse, its primary concern was with the share which should be allocated to the holders of Class B stock in the reorganization. Its activities, therefore, were principally directed to the benefit of that class of stock. Its position in this regard was not unlike that of a large unsecured creditor seeking recognition for its claim in a bankruptcy reorganization. Its activity in the reorganization was directed to the benefit of its own claim and any benefit which inured to the estate or any class of creditors was merely incidental to its principal purpose. Standard was itself the class which was benefited by its contribution to the plan. Its activities so far as being compensable in this proceeding must be distinguished from the activities of counsel in behalf of a certain group of security holders and whose activities benefit this

entire class and contribute to the plan. The very necessities of such a situation suggest the fairness and equity of having the estate burdened with such expense rather than to impose it upon the small and many individual security holders. Here, however, the benefits which Standard itself received from its efforts strongly suggest that any legal expense in connection therewith should be borne by it.

In response to the Commission's contention that Standard was responsible for the complexities which brought about the proceedings under 11 (e) of the Holding Act, Standard urges that during the years that it was the parent of the Delaware Company, such relationship was in no way in violation of the law, and the Commission's action in "penalizing" it for its past activities is in effect imposing an ex post facto penalty on Standard. However, the Court does not find that it is necessary to refer to the many alleged abuses of Standard, which, according to the Commission, milked the Northern States system during the time that Standard was in control. The undeniable fact is that, as a result of this reorganization, Standard emerged therefrom as the largest stockholder of the Minnesota Company. It is elementary that a successful litigant should pay its own counsel.

Standard contends that the Commission's position is inconsistent in that it did authorize the reimbursement to Standard of its advancement to the expense of the Stone & Webster report. But such action by the Commission in authorizing the reimbursement of moneys paid out for the benefit of the estate in no way commits it to the allowance of Standard's attorneys' fees. If there was inconsistency, it redounded to Standard's benefit and it cannot complain.

In light of all the circumstances and in view of the prior relationship between Standard and the Delaware Company, this Court has no doubt that the Commission acted in accordance with sound, equitable principles and legal standards in requiring Standard to pay its own counsel. The objections of Standard are overruled and the Commission's action with respect to its claim for reimbursement is in all things sustained.

An order consistent with the foregoing may be presented, and for the convenience of the parties it is suggested that Mr. Youngquist prepare such proposed order and present it to the Court on ten days' notice to all interested parties.

An exception is reserved to all aggrieved parties.

Dated this 12th day of January, 1953.

BY THE COURT:

GUNNAR H. NORDBYE

Chief Judge.

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IN THE

Supreme Court of the United States.

No. 111.

OCTOBER TERM, 1953.

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

JAMES F. MASTERSON,
Respondent.

BRIEF ON BEHALF OF JAMES F. MASTERSON IN OPPOSITION.

QUESTION PRESENTED.

Whether the District Court in performing its functions as a statutory Enforcement Court under Section 11(e) of the Holding Company Act and as a Review court under Section 10(e) of the Administrative Procedure Act, may approve the payment of a fee to counsel for one of the principal parties, which the Court found, upon review of the record evidence, had been unjustly and unreasonably denied by the Securities and Exchange Commission, and such finding was affirmed by the Court of Appeals, "upon consideration of the record", as a permissible exercise of the Enforcement Court's judgment in the performance of its reviewing function.

OPINIONS BELOW.

In re North Amer. Light and Power Co., 101 F. Supp. 931 (R. 72a-83a); 106 F. Supp. 686 (R. 83a-85a); *In re North Amer. Light and Power Co.; Securities & Exchange Commission v. Masterson*, 202 F. 2d 638 (R. 232a-233a).

STATUTES INVOLVED.

Section 11(e) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. 79a, et seq.); and

Section 10(e) of the Administrative Procedure Act (60 Stat. 327, 5 U. S. C. 1001).

STATEMENT.

This Court is requested to grant the Writ of Certiorari upon a question which is essentially factual, viz: Did the Securities and Exchange Commission, on the facts of record in the case, unreasonably withhold from respondent a portion of the fee claimed by him in the present proceeding? The Enforcement Court held that upon the facts of the case it did. Upon those facts the Court Below affirmed.

An understanding of the case presented by the petition requires a more adequate statement of the facts than that contained in the petition.

The Proceedings.

Respondent Masterson was retained by North American Light & Power Company ("Light and Power") in 1943 to render legal services in connection with the complex and difficult proceedings in which the Company was then involved and which continued actively over the next five years, under the circumstances described below.

Light and Power, a Delaware Corporation having a capitalization of approximately $50,000,000, was registered under the Public Utility Holding Company Act as a holding company in the system of The North American Company. In 1941 Light and Power took steps to effect a voluntary dissolution under the provisions of the Delaware Corporation Law, but the SEC applied to Judge Leahy of the United States District Court for the District of Delaware for an injunction preventing the Company from dissolving except pursuant to proceedings under the Holding Company Act. While the injunction proceedings before the District Court were still pending, Light and Power consented to the entry by the SEC of an order under Section 11

(b) (2) of the Holding Company Act specifying that North American and Light and Power "shall proceed with due diligence to bring about a liquidation of Light and Power in accordance with a plan that is fair and equitable to the security holders affected thereby.[1] In pursuance of this agreement, Light and Power on October 15, 1942 filed with the SEC under Section 11(e) of the Holding Company Act, a plan providing for its liquidation and dissolution. Shortly thereafter, Illinois-Iowa Power Company (later Illinois Power) a former subsidiary of Light and Power, filed with the SEC claims against Light and Power amounting to some $26,500,000, based upon alleged past acts of mismanagement. Light and Power moved to dismiss these claims on the ground that the SEC lacked jurisdiction to adjudicate them. The SEC denied the motion (Commissioner Healy dissenting) and ordered the presentation of evidence.[2]

Light and Power thereupon proceeded in the hearings before the SEC to assert legal and equitable defenses against the claims of Illinois Power, and to adduce evidence in refutation of the Illinois claims as well as in support of its affirmative defenses. An attorney for a group of preferred stockholders of Light and Power (Lawrence Condon) sought to intervene in the proceedings to compel Light and Power to file a "claim-over" against North American Company. Light and Power opposed the interjection of the "claim-over" against North American as an untimely and prejudicial complication, and contended that the Illinois Power claims "should be resolved first, 'unencumbered by any other issues at that time'" (R. 51a, 98a-100a). The SEC, although denying Condon's petition, subsequently (September 8, 1943) granted his group leave to file a statement of "claim-over" against North American and to adduce evidence with respect to it.[3] Light and Power filed a

1. See *North American Light & Power Co.*, 10 SEC 924, 930-2.

2. *North American Light & Power Co.*, 12 SEC 709.

3. See *North American Light & Power Company Holding Company System*, 14 SEC 576 (1943).

petition for review under Section 24(a) of the Holding Company Act in the Court of Appeals (Third Circuit) urging that it was prejudiced by the untimely interjection of the claim-over controversy, but the Court denied the petition on the ground that the SEC's order was interlocutory and hence not reviewable at that stage.[4]

Before the SEC, hearings on the Illinois Power claims against Light and Power proceeded intensively until the latter part of 1943, and were the subject of briefs and oral arguments before the Commission on July 27, 1944. Hearings on the claim-over against North American commenced toward the end of 1943 and continued, with interim adjournments, until the closing of the record in 1946. As had been feared by Light and Power, the "claim-over" hearings produced further complications in respect of the Illinois Power claims against Light and Power, and led to a reopening of that phase of the controversy. In the Fall of 1945, Illinois Power was granted leave by the SEC to amend its statement of claim to include an additional claim against Light and Power, and also a claim directly against North American; and the Condon group was also permitted to file additional claims against North American.[5]

Since it was necessary "to hold further protracted hearings on the above mentioned additional claims" (R. 25a) the record was not finally closed until April 22, 1946, at which time it comprised some 13,000 pages of testimony and 5000 exhibits.[6] Thereupon, briefs and requested findings were prepared and filed on behalf of all parties, and oral argument was scheduled to be held before the Commission in December 1946, on the merits of the complex controversy. Shortly before that date, the three companies involved (Illinois Power, Light and Power and North American) announced that they had reached a settlement of the claims affecting Illinois Power, and that Light and

4. *North American Light and Power Co. v. SEC.* (unreported) C. A. 3, No. 8388, Oct. 14, 1943. See 2 SEC Jud. Dec. 1331.

5. Holding Company Act Release No. 6144; cf. R. 24a.

6. R. 25a.

Power and North American had agreed upon a revised dissolution plan for Light & Power. The settlement as to Illinois Power was subsequently embodied in plans and applications filed with the SEC, and approved by it on April 30, 1947.[7] Thereafter, enforcement proceedings were held before Judge Leahy, and on May 28, 1947 he entered his decree approving and enforcing the settlement plan with respect to the claims of Illinois Power. On July 25, 1947 the SEC issued its findings and opinions with respect to the proposed settlement of claims between Light and Power and North American and the plan of dissolution of the former, and required certain amendments therein. These amendments were duly filed, and the SEC approved the amended program. Enforcement proceedings were again held before Judge Leahy, and on November 6, 1947 he approved and enforced this further plan over the objections of certain stockholders of Light and Power (the Dana group) who had come into the proceedings as they approached their conclusion.[8] The Court of Appeals affirmed the District Court on November 5, 1948.[9] Certain collateral questions with respect to the right of the objecting stockholders to receive an interim dividend distribution were thereafter decided by Judge Leahy,[10] and on appeal his determination was affirmed.[11]

Respondent's Services.

Respondent, James F. Masterson, a Philadelphia attorney, was retained by Light and Power in the early part of June 1943, to serve as one of its attorneys in connection with the congeries of proceedings before the SEC and the courts outlined above (R. 197a, 205a). The date of Mas-

7. *North American Company, Holding Company Act* Release No. 7375.

8. *In re Illinois Power Co.*, 74 F. Supp. 317.

9. *In re North American Light & Power Co.*, 170 F. 2d 924 (C. A. 3, 1948).

10. *In the Matter of Illinois Power Co.*, 84 F. Supp. 342 (D. Del., 1949).

11. *Appeal of North American Light and Power Co.*, 180 F. 2d 975 (C. A. 3, 1950).

terson's entrance into the case was approximately three months prior to the date that the Commission granted leave to Condon to file the "claim-over" on behalf of Light & Power against North American.

The record discloses the following facts with respect to the Masterson employment. The offices of Light & Power were situated in Chicago. Prior to Masterson's being retained by Light & Power, the company had been principally represented in the various proceedings before the SEC and the Courts by Clayton E. Kline, member of a law firm of Topeka, Kansas, who had been retained to serve as general counsel to Light & Power in March 1942 (R. 51a). As the proceedings with respect to Light & Power's program of dissolution took on steadily mounting complexity, and as the SEC opened the door ever wider to an unprecedented labyrinth of claims, counterclaims and claim-overs to a point that elicited dissent from the Commission's senior member,[12] the Board of Directors of Light & Power concluded that Kline should have the active assistance of competent eastern counsel (R. 208a, 224a-226a).

Inasmuch as the hearings before the SEC were conducted at its offices which were then located in Philadelphia, and the various court proceedings took place before the District Court of Delaware and the Court of Appeals for the Third Circuit, the Board recognized that employment of Philadelphia counsel would subserve both the convenience and economy of the company and its general counsel. However, the directors had in mind something more than retaining local counsel merely to serve as liaison between their general counsel in Kansas, their officers in Chicago, and the SEC in Philadelphia, and to make available the facilities of his office to the company and its general counsel. Although Kline was to remain in active charge, the Board of Direc-

12. Commissioner Healy dissented from the Commission's acceptance and assertion of jurisdiction with respect to claims which were essentially equity actions of a type long cognizable in the Courts, and having scant relationship to the fundamental purposes of the Holding Company Act.

tors wished the local counsel to participate in the proceedings in association with Kline and to render him active assistance as the proceedings developed; they also wished him to be adequately familiar with the various phases of the case and the record so that he could carry on with the proceedings in the event Kline became ill or otherwise unavailable in the course of what promised to be, and turned out to be, protracted and difficult proceedings of the utmost importance to the company and its security holders.

Masterson was selected by the Board of Directors on the recommendation of the President of Light & Power, who had encountered him in connection with an earlier phase of the case and who had also received a favorable report concerning Masterson from a member of a prominent Chicago law firm (R. 225a-226a).[13] The actual details of the retainer were arranged with Masterson by Kline, and it was clearly understood that the allocation of work as between Masterson and Kline would be made by Kline (R. 205a, 225a). With respect to compensation, Kline asked Masterson if he "would go in the case on a per diem basis", and Masterson replied that his minimum per diem was $250 (R. 205a). Kline asked whether he would consider "an arrangement of a retainer of $100 a day and expenses, with the ultimate compensation to be paid at the end of the case." Masterson agreed, the arrangement was duly authorized by resolution of Light & Power's Board of Directors, and he embarked upon his services (R. 206a-208a).

In pursuance of the understanding that he was to become adequately conversant with the case so as to assist Kline actively and be in a position to take over fully if necessary, Masterson immediately proceeded to Chicago where he spent a full week (June 14-19, inclusive), in intensive conferences with Kline and company officials and financial experts, and in familiarizing himself "with the

13. The record establishes that Masterson is a lawyer of long and varied experience at the bar, including a considerable amount of trial work as well as financial, corporate and reorganization practice (R. 207a, 213a, and 219a).

background and history of the company and its intercorporate relations with a great number of other companies" (R. 206a). Upon the resumption of the hearings before the SEC on June 21, 1943, Masterson appeared on behalf of Light & Power along with Kline, for the first time.[14] Thereafter, over the course of the next four years until the conclusion of the hearings before the SEC in October 1947, Masterson or an associate [15] represented Light & Power at all the more important hearings, either together with Kline or alone. Over the entire period, there was a total of approximately 159 such hearing days, on about half of which Masterson or his associate was the only counsel for Light & Power present. Many of these hearing "days" extended late into the night, since it was necessary after adjournment of the hearing to interview witnesses, and prepare evidence, motions and briefs during the more intensive phases of the case.[16]

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14. This first session lasted for six straight days, and then adjourned to permit the preparation of additional testimony and documentary evidence. The hearings reconvened for another full week in July, and again in August, September and October. Subject to longer interim adjournments, this was more or less the pattern of hearings followed over the ensuing four years, although some sessions of hearings would continue for two or three weeks with recess only for holidays. (See schedule of hearings attended by Masterson, R. 199a-203a.)

15. On a relatively few occasions when Masterson was unavoidably absent, he was represented by an attorney from his office named Palmer (R. 213a).

16. For example, Masterson testified, without contradiction:

"We worked out in Chicago from nine or ten o'clock in the morning until 12 and one the next morning." (R. 206a)

* * *

"When Mr. Kline came to Philadelphia and finished over at the Commission at 4:30—that was near the end of the case—we would get together either in my office or in his hotel room, and as I told you before, worked sometimes until one or two in the morning." (R. 214a)

* * *

"When the Commission ousted us as counsel for Light & Power in the claim-over against North American and we appealed that case to the Court of Appeals, I argued that before

The most intensive periods of hearings for Kline and Masterson were those relating to the claims of Illinois Power against Light & Power and the latter's defenses thereto. It was in this crucial phase of the proceeding that Kline, with Masterson's assistance, carried the exclusive responsibility of the case on behalf of Light & Power and "performed it well", as the SEC stated.[17] A much less intensive role was played by Kline and Masterson in that phase of the proceedings which dealt with the "claim-over" asserted by the Condon group against North American on behalf of Light & Power. As has been indicated, Light & Power was strongly opposed to the interjection of any "claim-over" issues against North American until there had been a determination as to what, if any, liability could be found against Light & Power in respect of the sharply contested Illinois Power claims.[18] Masterson appeared and

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the Court of Appeals. In all other matters, I was advising with, working with Mr. Kline. There were motions and motions and motions, briefs that we had prepared in our office, research that occurred during the course of the trial on legal points that were raised." (R. 201a)

17. See, for example, the Recommended Decision of the Public Utilities Division, adopted by the Commission, where in discussing Kline's services, it is stated (R. 53a):

> "In the case of Kline, it is clear that he had a great responsibility in representing Light & Power in the conduct of the claims case. He accepted a difficult task and, insofar as the claims of Illinois Power against Light and Power are concerned, performed it well."

18. It is to be noted that in connection with the ultimate compromise settlement of the Illinois Power claims, there was no determination of the merits of this controversy; and although Light & Power made certain payments in connection with the settlement it also received various benefits thereunder so that, as the SEC found, it is doubtful whether Light & Power actually sustained any out-of-pocket cost. Thus, the Commission stated:

> "The proposed settlement reached after full arm's-length bargaining between completely adversary parties, is of benefit to both sides. Light & Power will effectively terminate this litigation and take a large step forward toward being in a position to complete its long-deferred liquidation. In addition it is uncertain to what extent the out-of-pocket expense of settlement

argued before the Court of Appeals in support of Light & Power's petition for review of the SEC's order permitting Condon to file and assert the "claim-over". When the Court held the order not reviewable at that time, Light & Power decided to adopt a position of watchful waiting with respect to the claim-over and to do whatever was necessary to "protect our record" because the Circuit Court had determined that it [the SEC order] was an interlocutory order (R. 210a). Kline requested Masterson to attend the hearings on the claim-over, press an objection to all of the testimony that was offered by Mr. Condon and take whatever action was necessary to exclude anything prejudicial to Light & Power (R. 210a). In order to limit his attendance at these hearings to the minimum believed necessary for the protection of Light & Power's position, Masterson attended only the more important of the hearings held on this phase of the case. Following the filing by North American and Light & Power of the Step I Plan and the approval by the SEC of the various phases thereof, Masterson appeared with Kline in behalf of Light & Power in all phases of the enforcement proceedings before Judge Leahy during 1947.[19]

The final outcome of all these various proceedings was, from the viewpoint of Light & Power and its stockholders, highly favorable.[20]

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represents an actual cost to Light & Power. Because of the form of the settlement, Light & Power will have strengthened its equity in Illinois Power and to a part of the extent that Illinois Power benefits from the settlement, Light & Power does likewise." (*North American Co. and Its Subsidiary Companies*, H. C. A. R. No. 7375, p. 25).

19. R. 215a.

20 Shortly after Illinois Power filed its $26,500,000 claim against Light & Power, the Commission envisaged that if this claim were upheld, Light & Power's assets might be insufficient to satisfy even the claims of all its creditors (*North American Co.*, 14 SEC 576, 579). At the conclusion of these proceedings, after Light & Power had discharged all claims of creditors and had disposed of the Illinois Power claims, the Commission stated the evidence established that the value of the assets remaining for Light & Power's stock-

When all SEC and Court proceedings had been completed, pursuant to the request of the SEC all counsel and financial experts who had rendered services in the various phases of the proceedings filed statements of their claims for compensation and reimbursements of expenses. Masterson set forth a brief chronological schedule showing the rendition of services by him on behalf of Light & Power over the four years and five month period June 11, 1943-November 4, 1947 aggregating 219¾ days,[21] on which he credited $21,975 received from Light & Power at the agreed interim retainer rate of $100 per day.[22] He stated he believed that $200 per day would constitute fair and reasonable compensation for the services performed by him, and therefore requested payment of an additional $21,975 (R. 197a-203a).

At the subsequent hearings before a hearing examiner of the SEC in June and July 1950 at which the various claimants, including Masterson, testified and were cross-examined by SEC counsel, Kline as general counsel of Light & Power stated that the Board of Directors of Light & Power believed the requested fee of Masterson was "reasonable" (R. 224a). Thereafter, North American Company and Light & Power filed in the record a joint

holders was somewhere between $70,000,000 to $90,000,000, without giving consideration to any contribution made by North American Company to the public common stockholders of Light & Power (*The North American Company and Its Subsidiary Companies,* H. C. A. R. No. 7514, p. 29). While the advance in the market value of Light & Power's assets played a role in this remarkable achievement, it cannot be doubted that Light & Power's success in discharging the Illinois Power claims without any determinable cost to it (*supra,* note 18) was attributable to the extremely strong record which Light & Power's attorneys made in the defense against these claims.

21. This was subsequently itemized as 159 hearing days and 60¾ days additional of office work and conferences.

22. He also credited $615.47 received as reimbursement of out-of-pocket disbursements. None of these reimbursements included any part of his office overhead, which totalled between $35,000 and $40,000 per year (R. 214a).

memorandum dealing with the fees of certain of the claimants, including Masterson, which stated: "Since the hearings Mr. Masterson and representatives of Light & Power have agreed that a fee of $31,975 will be mutually satisfactory."[23] The memorandum further stated with respect to the adjusted Masterson fee and the others discussed therein: "Accordingly, each of the foregoing amounts represents not a unilateral claim but a fee fixed and determined to be fair and reasonable after discussion with representatives of Light & Power and/or North American" (R. 204a).

SEC and District Court Decisions.

In its Memorandum Opinion and Order dated May 7, 1951, the Commission recognized that respondent had performed substantial services, but deemed it significant that "Masterson was subordinate to Kline who has received a substantial allowance". It also thought Masterson's services "duplicated those of Kline to a considerable extent, and were to a degree unproductive."[24] While the Commission made a passing reference to the agreement between Masterson and Light & Power, it did not otherwise discuss it or in any way indicate that the Commission regarded it as entitled to consideration. The Commission thereupon entered an order denying allowance to Respondent of any

23. R. 204a. This amount included the $21,975 paid to Masterson over the period 1943-1947 under the arrangement for the payment of the interim compensation of $100 per day, thus leaving a balance due Masterson of $10,000.

24. The Commission's rationale, as stated in the concluding paragraph of its laconic opinion, is as follows:

> "Masterson worked on various applications, motions and briefs, interviewed witnesses in preparation for trial and consulted with Kline as to trial methods, and attended numerous hearings and conferences. We have recognized his contribution by approving the payment to him of $21,975. However, Masterson was subordinate to Kline, who has received a substantial allowance, and his services duplicated those of Kline to a considerable extent and were to a degree unproductive." (R. 67a)

"further sum in addition to fees and expenses already received by him" (R. 70a).

Some months following the issuance of the foregoing opinion and order of May 7, 1951, the SEC brought the foregoing determination as to the fee claims of Masterson and certain other aggrieved claimants before the District Court of Delaware for judicial review and "enforcement"; [25] and at the same time its attorneys obtained from Judge Leahy the signature of an order restraining Masterson and the other claimants from instituting any proceedings "in this or any other forum" with respect to their claims for compensation for services in connection with the proceedings relating to Light & Power's dissolution and the disposition of the various claims (R. 14a). In response to the order of the Court, counsel for Masterson and for a claimant named Dabney, filed with the District Court formal statements of objections to the SEC's Supplemental Application No. 2; and Masterson's counsel petitioned the Court to grant him affirmative relief with respect to the additional $10,000 of compensation payable under the agreement between Masterson and his client Light & Power.[26]

On December 3, 1951, after having received briefs and heard oral argument, Judge Leahy issued his opinion upholding the SEC's determination as to Dabney, but revers-

25. In its application filed with the District Court termed "Supplemental Application No. 2" (R. 8a-16a) the SEC asserted, among other things, that:

> "Certain of said fee claimants indicated to the Commission that they proposed to contest the fairness of said provisions of Plan I and Amended Plan I and to seek review of the Commission's denial of their applications for fees. This Court having taken exclusive jurisdiction of Illinois Power, Light & Power and North American, and all their respective assets for the purpose of carrying out the terms and provisions of Amended Plan I * * *, *this Court has full jurisdiction to review said determination of the Commission and to pass upon the fairness of the provisions of said plans relating to the denial of payment of fees to the aforesaid claimants.*" (Italics supplied.)

26. R. 70a-71a.

ing as to Masterson. With respect to Dabney, the Court found that there was substantial evidence on the record to support the SEC's determination, but with respect to Masterson, the Court found the Commission's determination not supported by substantial evidence on the record nor in accordance with legal standards.

The Court made clear that on the basis of its examination of the record evidence, it felt that there was ample justification for Light & Power's view that "this litigation involved tremendous amounts of money; and due to the complexity of the legal proceedings and the long tenure of the litigation, it was to the best interest of Light & Power that it be represented by more than one attorney." [27] The Court pointed out that the services of attorneys associated in the trial of a complex litigation "may be highly complementary, even though 'duplicative' "; and it emphasized that "Both Masterson and Kline, the record discloses, worked in 'close harmony' ",[28] and that Kline also "rejected" the SEC's contention that Masterson's services were "merely duplicative." [29] The Court further pointed out that the record established that the $100 interim per diem received by Masterson, to which the SEC held he should be limited, "would not be sufficient to cover his routine office expenses",[30] and that "every party in interest except the SEC", including the Board of Directors of Light & Power as well as North American (which would in practical effect be the payor of the fee) [31] thought the $150 rate "was a reasonable attorney's fee".[32] The Court concluded, "after an examination of Masterson's services", the com-

27. R. 80a.

28. Ibid.

29. R. 79a.

30. R. 80a.

31. Under Plan I North American became the recipient of all Light & Power's residual assets. It had been represented by its own counsel throughout the proceedings and was thus fully familiar with the services rendered by Masterson for Light & Power.

32. R. 80a.

promise agreement reached between the attorney and his client should be given effect.

The SEC petitioned the District Court for rehearing, professing to construe the Court's opinion as a holding that the SEC lacked jurisdiction and authority in connection with plans under § 11(e) of the Holding Company Act to supervise or in any way disturb fee arrangements entered into between a holding company and its attorneys. Judge Leahy granted the SEC's petition for rehearing, and thereafter received additional briefs and heard further argument from the parties and from an *amicus*. On July 16, 1952, the Court issued its supplemental opinion dealing with the rehearing, which in substance reaffirmed the conclusion, and elaborated briefly on some of the reasoning set forth in the Court's opinion of December 3, 1951; and on August 25, 1952, the Court entered its order.[33] On appeal therefrom, a unanimous Appellate bench held that:

> "Upon consideration of the record we are of the opinion that the District Court's action was a permissible exercise of its judgment in the performance of its reviewing function and that it should not be disturbed." (202 F. 2d at 639)

REASONS WHY THE WRIT SHOULD BE DENIED.

I. A Determination of the Fanciful Issue Posed by the Petitioner Would Not Affect the Outcome of the Case at Bar.

(A) We are constrained to point out that Petitioner, in the major argument set forth in its brief, as well as in its statement of "Questions Presented", has sought to give the issues presented a twist which is decidedly not warranted by the decisions of the Courts below.

Petitioner seeks to construe the District Court's decision as a holding that the SEC must accept as "con-

33. R. 85a-86a.

clusive" all fee arrangements between holding companies and their attorneys unless the Commission can show that a particular agreement is "unconscionable". We submit this is a distortion of the Enforcement Court's decision, which held no more than that the specific agreement here involved, negotiated at arm's-length between a company and specially-retained counsel for valid legal services duly performed in a complex and crucially important litigation, was arbitrarily brushed aside by the SEC in the face of the record evidence establishing both the fairness and reasonableness of the agreement and the unfairness of the SEC's determination.

Taken separately or together, neither of Judge Leahy's opinions stands for the proposition that agreements between companies and their counsel for legal services in Section 11(e) proceedings must be given conclusive weight or even presumptively conclusive weight in determining the value of those services. Both opinions made it clear that "under the facts of the case at bar" (R. 84a) [34] the Court found that the compensation agreed upon by the attorney and client in the instant case had been unjustly and unreasonably denied by the SEC. To be sure, the Court did accord weight, and properly, to the managerial judgment that "this litigation involved tremendous amounts of money; and due to the complexity of the legal proceedings and the long tenure of the litigation it was in the best interest of Light & Power to be represented by more than one attorney".[35] But it did so not only because this was the judgment of the Board of Directors which bore the full legal responsibility for protecting the company's assets from the highly dangerous assault which had been launched

34. Cf. the similar emphasis in the first opinion on "the facts of *this* case" (R. 81a; the italics are the Court's), and the following phrase "after an examination of Masterson's services", which examination the Court had made and discussed in the preceding pages of the opinion.

35. R. 80a; 101 F. Supp. at p. 936.

thereon, but also because the record abundantly established the reasonableness and indeed the wisdom of that managerial decision "in the factual context here" (R. 85a).[36]

36. 106 F. Supp. at p. 687.

The Commission's critical references to the alleged "duplication" of services which resulted when both Kline and Masterson attended hearings were unjustified not only for the reasons Judge Leahy pointed out (R. 80a; 101 F. Supp. at p. 936), but also in the light of the particular facts of record in this case and the ordinary practice in even far less protracted and complex proceedings under Section 11(e). In the instant proceedings, which stretched over a period of more than five years and involved both enormous sums of money and an enormous record, virtually every major party in interest had to be and was represented by more than one attorney, whether through the services of several members or associates of one firm, or independent associate counsel, or both. An example of the latter was the situation as to Illinois Power Company, which was represented by two prominent Chicago law firms (Mayer, Meyer, Austrian & Platt and Pam, Hurd & Reichmann (R. 57a-64a). At times each of these firms sent more than one representative to attend the hearing and rarely were they represented by a single attorney. Notwithstanding a specific finding that the services of these two firms were "to a certain extent duplicative" (Recommended Decision of the Division of Public Utilities, page 19) the Commission approved the full amount which Illinois Power had paid those firms, an aggregate of $457,000 in compensation plus some $37,000 in disbursements (R. 59a, 64a). Similarly the Commission approved payment of $500,000 to Sullivan & Cromwell, counsel to North American, which had had two partners and four associates working on various phases of the case, even though the Division alleged the services of that firm in some respects unnecessarily "duplicated" those of counsel for Light & Power.

Certainly, none of the participants in this case could point to more justification and need than Light & Power for adequate, and indeed ample, legal representation. None was more directly involved nor had so great a stake. It is to be borne in mind that these proceedings not only related to the plan of liquidation of Light & Power, but also to the adjudication of staggering claims asserted against it aggregating more than $26,000,000, an amount which there was reason to believe exceeded the actual value at that time of the entire equity available for Light & Power's security holders. In the face of these factors, it seems almost incomprehensible that anyone would question the prudence and justification of the decision reached by Light & Power's Board of Directors that its general counsel Kline (located in Kansas) should have the maximum assistance of ex-

Similarly, in upholding the compensation at the rate of slightly less than $150 per day embodied in the final agreement between attorney and client, the Court properly attributed weight to the circumstance that this compensation was negotiated at arm's-length and found appropriate by those who were to pay it—the managements of Light and Power and North American Company, both of which had an intimate first-hand knowledge of Masterson's services rendered without as well as inside the hearing room. But it is entirely plain that the Court's approval of this compensation gave consideration to many other factors of record, including the evidence as to the attorney's many years of experience as a trial attorney and the amount of his office overhead (R. 207a-213a), the detailed and indeed conceded nature of his extensive services in the case at bar,[37] his close collaboration with Kline to produce a highly favorable outcome for the company and its stockholders,[38] and his usual and customary $250 charge for services on a

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perienced Eastern counsel, both at the hearings and in preparation therefor, to be able to carry on in the event of Kline's incapacitation, and to spare Kline the time and expense of the many additional trips east he would otherwise have had to make (R. 224a). It is further to be borne in mind that the highly successfully outcome for Light & Power, fully vindicated the handling of the case by the management and attorneys of Light & Power.

37. It may here be observed that in contrast with Petitioner's unwarranted intimations that Respondent did little more than waste time (the amount of which it now even seeks to impugn, although the Commission itself did not, and the innuendo is utterly baseless) and its brash reference to his "insignificant contribution" (Petition, p. 11), even the Commission conceded and formally found on the record that substantial services were rendered over the five-year period, outside as well as within the hearing room:

> "Masterson worked on various applications, motions and briefs, interviewed witnesses in preparation for trial and consulted with Kline as to trial methods and attended numerous hearings and conferences." (R. 67a)

38. Cf., the Court's finding:

> "Both Masterson and Kline, the record discloses worked in 'close harmony.'" (R. 80a; 101 F. Supp. at p. 936)

per diem basis (R. 219a). Indeed, not only did Respondent's testimony on this latter point stand on the record uncontradicted and unchallenged, but the record also established that this level of compensation was reasonable and indeed modest in relation to the scale of attorneys' compensation which the SEC itself considered appropriate and actually allowed to virtually all other counsel in this case whose services were found compensable.[39]

The record on which the Enforcement Court made its determination, and with which Judge Leahy was familiar by virtue of his long years of association with the various phases of the proceedings, abounded with proof of the difficult problems of law and evidence with which Kline and Masterson were required to deal on behalf of Light & Power in bringing the case to its successful outcome. In its Opin-

39. Thus, the Commission by its Memorandum Opinion and Order of December 21, 1950 (R. 57a-60a) approved compensation of $370,000 for the law firm of Mayer, Meyer, Austrian & Platt, which involved a total of approximately 9,000 hours of time. (Recommended Findings of the Division of Public Utilities [unprinted], p. 16.) This is $300 per 8 hour day, averaged for the time of juniors as well as partners. In addition, the Commission approved payment of $87,500 to Pam, Hurd & Reichman, another firm which represented the same client, and which kept no records nor produced even an estimate of time expended (Recommended Findings [unprinted], p. 17.

The Commission also allowed $500,000 to the law firm of Sullivan & Cromwell for services involving some 16,000 hours (of which less than half represented partners' time), or a rate of compensation of more than $30 per hour.

Compensation of $100,000 was allowed by the Commission to an attorney named Jackson (counsel to the Dana group which prosecuted the unsuccessful appeal from the approval of the Compromise Plan) which, on the basis of the 2,030 hours of time expended (Recommended Findings [unprinted], p. 33) is equivalent to about $50 per hour. Other applicants similarly were allowed compensation within the range of $30 to $50 per hour.

Our survey of SEC fee decisions in other cases, confirms that the range of compensation repeatedly approved for counsel in 11(e) plans is from $30 to $50 per hour, and that in the case of company counsel a substantial portion of the time compensated on this basis is that of junior associates and others of non-partner status.

ion approving the final plan, the Commission itself acknowledged these factors as follows:

> "The record is impressive in its disclosure of the difficult factual and legal questions involved. The specific defenses have involved difficult questions of res judicata, corporation law, dividend law, burden of proof, dominant stockholder's obligations, as *well* as other legal questions. Each claim has been controverted on its facts or by interpretation of the facts." (*North American Company and Its Subsidiary Companies,* H. C. A. R. No. 7375 (page 23 [1947].)

It was on the basis of all the foregoing record evidence and the many other factors heretofore discussed that the Enforcement Court in its Order of August 15, 1952, made the formal finding that

> ". . . the fee to said James F. Masterson of $10,000 agreed to be paid to Masterson by North American Light & Power Company is on the basis of the facts of record, found to be fair and reasonable, and it is hereby allowed . . ." (R. 86a)

(B) The SEC's attorneys commenced to give the District Court's decision the peculiar gloss with which it is embellished in the Petition at bar, shortly after the issuance of the District Court's initial opinion of December 31, 1951. In their petition for rehearing in the District Court they urged that the Enforcement Court had predicated its decision on the mistaken view that the SEC entirely lacked jurisdiction to pass upon fees and expenses in connection with 11(e) plans or to interfere in any way with arrangements between holding companies and their attorneys. Notwithstanding the District Court's supplemental opinion of July 16, 1952, seeking to make crystal clear that such was not the intendment or purport of the Court's decision, the SEC's attorneys proceeded to press vigorously upon the

Court of Appeals substantially the same peculiar reading of the Enforcement Court's decision.[40]

The Court of Appeals in its unanimous per curiam opinion rejected this misconstruction, and expressly found that the District Court's decision held only

> "*that in all the circumstances of this case* the Securities and Exchange Commission exercised its power over fees in the way that was not just and reasonable when it awarded Masterson attorney's fees in an amount less than that sought by him and agreed upon by his client the North American Light & Power Company." [41] (Emphasis supplied.)

This accurate interpretation of the District Court's decision was followed by the Court of Appeals' conclusion that on the basis of its own consideration of the record, the District Court's determination should be affirmed.[42]

In the face of the limitations placed upon the decision by the opinions of both Courts below, it seems strange and paradoxical to find Petitioner persisting in the fanciful attempt to inflate these opinions into a ruling of law of general applicability to fees in Section 11(e) proceedings which "deny the Commission effective control over such fees to the extent agreed to by a holding company client" (Petition p. 14). In urging this interpretation of the Enforcement Court's decision on this Court, presumably Petitioner is acting at the behest of the Commission.[43] But

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40. Thus, in the Commission's principal brief before the Court of Appeals (dated December, 1952) it was asserted (page 26):

> "In effect, therefore, the district court imposes on the Commission an unqualified mandate to accept an agreement made by holding company management *regardless of any effect it might have upon the purposes of the Act, or, even, the fairness and equity of the plan.*" (Emphasis supplied.)

41. 202 F. 2d at p. 639.

42. Ibid.

43. The petition in fact recites that it is brought by the Solicitor General "on behalf of" the Commission.

curiously enough, the Commission itself apparently has two versions of the effect of this decision, depending on whether it is *contending* for broader authority before the Courts or actually *exercising* authority in proceedings before it. Thus, one week after the filing of the Petition herein, the Commission in its Findings and Opinion rendered with respect to the fees of company counsel in another Section 11(e) proceeding, declared with respect to Judge Leahy's decision in the case at bar:

> "In the case cited [In re North American Light & Power Company, 101 F. Supp. 931, D. Del. 1951] we had rejected the request of counsel for a company in Section 11(e) proceedings for an additional fee in an amount agreed to by the company, and upon review the district court allowed the additional fee because of the agreement between counsel and company. On rehearing, the Court, although disclaiming any intention to hold that this Commission 'has no jurisdiction whatsoever in setting the fee of counsel who appear before it in a § 11(e) proceedings', reaffirmed its approval of the additional fee, stating that under the facts of the case at bar, the SEC did not give full weight to an important factor in setting the lawyer's fee, i.e., the lawyer-client relationship. *We do not construe this decision to mean that this Commission cannot determine the amount of a reasonable fee to be less than that agreed to by the company and its counsel.*" [44]

The Commission thereupon proceeded to allow a lesser amount as compensation to company counsel than that provided for in the management agreement, merely stating

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44. *Public Service Corporation of New Jersey and its Subsidiary Companies,* H. C. A. R. No. 12000, page 12 (June 16, 1953). Footnote references in the original (consisting of citations) have been omitted from the foregoing excerpt, and emphasis supplied.

that it was "excessive" but without any showing or even suggestion that it was "unconscionable".[45]

One of the Commissioners (Rowen) dissented from the reduction which the majority imposed on company counsel in the foregoing decision, stating that "in view of the extreme complexity of the proceeding, the experience and ability of this firm, and its notable contribution to the successful reorganization of Public Service, I am unable to conclude that the fee requested is unreasonable."[46] For purposes of his dissenting Opinion, Commissioner Rowen sought to extract the maximum of support from the only two judicial decisions which have set aside SEC determinations as to the fees of company counsel, the decision of the Enforcement Court in the instant case, and that of Judge Nordbye in the *Northern States Power Company* proceedings.[47] It is therefore significant to observe that the strongest interpretation the dissenting Commissioner could attribute to either of these decisions, or both together, was that they appear to grant to agreements between the company and its counsel "substantial weight as a measure of the reasonableness of a fee application submitted in accordance therewith." This is to be compared with Petitioner's present contention that these decisions require the Commission to give "conclusive" weight to such agreements unless shown to be "unconscionable."[48] Moreover,

45. As compared with the fee of $150,000 agreed upon between the company and its counsel, equivalent to approximately $34 per hour, the Commission allowed $125,000, equivalent to approximately $30 per hour for all time, including that of juniors.

46. Id. at page 30.

47. *In re Northern States Power Company* (unreported), D. Minn., Civil Action No. 2673, Jan. 12, 1953.

It is to be noted that in only one other decision has there been a reversal of the Commission in a case involved counsel fees; that case did not concern company counsel but did involve the reasonableness of the SEC's attempted disqualification of a committee counsel from receiving any fee. *SEC v. Cogan,* 201 F. 2d 78 (C. A. 9, 1952). Petitioner states that the Commission "concluded" not to seek certiorari in that case (Petition, note 21).

48. Petition p. 2.

the dissenting Commissioner thereupon went on to agree with the majority that in any event these decisions do *not* preclude the Commission from reducing "the agreed upon fee", provided the Commission determines that "otherwise the resultant fee would be unreasonable".[49]

It thus appears that the SEC itself, in marked variance from the contentions of its Counsel in the present Petition, plainly recognizes that the decision of the Enforcement Court in the instant case was predicated, as the Enforcement Court stated, on "the facts of the case at bar"; and that it does not preclude the Commission from reducing the agreed fee of company counsel, where the Commission properly—but not arbitrarily and dictatorily as in the instant case—determines that the resultant fee would be unreasonable.

(C) A further word is added concerning Judge Nordbye's decision in the *Northern States Power* case, inasmuch as it has been mentioned in the excerpt from Commissioner Rowen's Opinion quoted above, and is also referred to in the Petition (page 19), which states that copies are being filed with this Court. In view of the fact that this decision is presently pending on appeal before the Court of Ap-

49. Set forth below is the pertinent paragraph from Commissioner Rowen's dissenting Opinion:

> "While the Commission's authority to pass upon the compensation to be allowed participants in holding company reorganizations has been confirmed in the courts, certain recent judicial pronouncements would appear to grant to agreements between the company and its counsel, relating to the compensation of such counsel, substantial weight as a measure of the reasonableness of a fee application submitted in accordance therewith. This, of course, does not preclude the Commission from reducing the agreed upon fee, but apparently such reduction must be based upon considerations sufficient to overcome the persuasive force of a negotiated arrangement between the parties principally involved. The Court's opinion in *In re Northern States Power Company*, (unreported) (D. Minn., Civil Action No. 2673, January 12, 1953), indicates, *inter alia*, that an agreement of this nature may be disregarded if the Commission determines that otherwise the resultant fee would be unreasonable."

peals for the Eighth Circuit, we question the propriety of its interjection here by Petitioner at the present time. However, since Petitioner deemed this procedure essential in order to support its request for a writ in the instant case, presumably recognizing that this case would not justify the issuance of the writ on its own merit, we hope the Court will examine Judge Nordbye's decision and observe for itself how each of these two decisions turns on its own peculiar facts and relates to proceedings fundamentally very different in character.

The *Northern States* case involved no claims and cross-claims between subsidiaries and parents nor any "claim-over" litigation in the nature of a vastly complex $26,000,000 derivative stockholders suit,[50] such as occupied the preponderant portion of the time and efforts of company counsel in the instant case. As we read Judge Nordbye's Opinion, the principal point of relationship between *Northern States* and the instant case is that Judge Nordbye found upon his review of the record evidence that the Commission's action in that case was likewise arbitrary and unreasonable, although the factual situations were very different and the treatment meted out to Respondent by the Commission in the instant case [51] considerably more harsh. It appears to us that the Enforcement Court's ruling in *Northern States,* like that in the case at bar, is not that the

50. As has been pointed out *supra,* the Commission's senior member, Commissioner Healy, objected to the SEC's assertion of jurisdiction over these extraordinary inter-company claims on the ground that the Courts rather than the Commission were the proper forum for their adjudication.

An examination of Judge Nordbye's painstaking analysis of the *Northern States* proceedings which is reported at 80 F. Supp. 193 (D. C. Minn. 1948) makes it clear that no such extraordinary factors were involved in those proceedings.

51. In *Northern States* the Commission allowed a fee of $125,000 to one of the company counsel (Flynn) which was some $21,000 less than the amount agreed to between his firm and the company; it allowed $40,000 to another company counsel (Youngquist) which was some $14,000 less than the amount agreed upon with the company.

Commission must be bound by fee arrangements between companies and their counsel "unless these agreements are shown to be unconscionable", but rather that the Commission may not impose results which the preponderant record evidence establishes as arbitrary and unfair. A bona fide arm's-length agreement between company and counsel is one evidentiary factor entitled to weight, but as Commissioner Rowen pointed out, Judge Nordbye expressly recognized such agreements may be overridden if they do not pass the tests of fairness and reasonableness. In *Northern States,* not only did the Court find on the basis of its review of the record that the agreed-upon compensation was reasonable, but it also found that the Commission's rationale for imposing the reductions was unsound and capricious in that it retroactively punished counsel for advancing in good faith certain plans and presenting certain evidence, in accordance with the wishes and instructions of his client, but which apparently did not ultimately meet the Commission's approval in full.[52]

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52. Thus Judge Nordbye stated: "There is no contention or showing by the Commission that the amount claimed by Mr. Flynn is unreasonable in view of the legal services which he actually performed. There is no testimony which contradicts or questions the number of hours devoted to the proceeding or the reasonableness of the hourly rate requested by him. His skill and experience are not controverted. Concededly, the questions involved in this proceeding and affecting these companies were intricate, novel, and required high legal skill. It is not surprising, therefore, that the companies' views and policies in carrying out the apparent purposes and objects of the proceedings did not conform at all times to the Commission's views. To attempt to effect compliance with the Act necessarily presented difficult problems. Whether all of the companies' decisions, therefore, proved to be ultimately right or wrong, they were entitled to legal assistance and advice in doing that which they determined to be compatible and in furtherance of the objects of the proceeding. *If legal counsel engaged by these companies, and in carrying out their wishes, are to have their legal fees subjected to the arbitrary rule that, unless the services are ultimately proved to be in furtherance of the policies and plan finally approved by the Commission and the Court they will be disallowed, it would be hazardous indeed for any counsel to accept employment under such circumstances.* There

It is not for us to say whether the record in the *Northern States* case does or does not justify Judge Nordbye's decision. If it does not, it is to be presumed the Court of Appeals before which it is now pending will afford appropriate relief. But it does seem to us clear (as apparently it also is clear to the Commission, as has been seen) that Judge Nordbye in that case did not, any more than did Judge Leahy in the instant case, enunciate any such legal doctrine as that which Petitioner contends is presented by the case at bar.

(D) As the foregoing discussion indicates, Petitioner has improperly sought to transform judicial findings based on the facts of record in the instant case, as made by the Enforcement Court and affirmed by the Court of Appeals, into a broad legal question of the jurisdictional authority of the Commission to interfere with some hypothetical unfair or excessive fee arrangement between some hypothetical holding company and its counsel. By this unwarranted transformation of the decision of the Courts below, which turned on the assessment of the record evidence, Petitioner seeks an opinion from this Court on an issue which is not present in or determinative of the case at bar. We do not believe that the further assessment of the record evidence in the instant case presents a question important in the administration of Section 11 of the Holding Company Act. The complex inter-company claims and claim-overs which occupied the activities of counsel in this case were in many respects unlike those in any case which has come before the Commission, and certainly were wholly unlike any factual issues in the few remaining Section 11 proceedings presently pending in their final stages. Nor is it conceivable that there can be any such others in the future,

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is no contention by the Commission that the fees, if allowed as requested and approved by the companies, will affect in any way the fairness or equitableness of the plan, or that the payment will impose any unreasonable financial burden upon either the companies or their security holders." (Emphasis supplied.)

for the Commission itself several months ago announced that "the Section 11 (integration and simplification) program under the Holding Company Act has been substantially completed".[53] For these reasons, certiorari should be denied.

II. The Decision Below Was Clearly Correct.

A. The Judgment Below Places No Improper Burdens On the Commission's Fee Jurisdiction.

(1) In the factual context of this case, the issue before the Courts below was not whether the SEC may supervise the payment of fees in a Section 11(e) proceeding, but whether the Commission may impose arbitrary and drastic rulings, unsupported by any record evidence, and with complete immunity from review by any reviewing tribunal. As has been shown, the Courts below found that in the case at bar the SEC had "exercised its powers over fees in the way that was not just and reasonable."[54] If, as Petitioner contends, those concurrent findings of the two Courts "deny the Commission effective control over such fees", then what is really being requested of this Court is a ruling that the determinations of the SEC with respect to the allowance or denial of fees in Section 11(e) proceedings shall be absolute, and in essence, final and non-reviewable. Not only is this the inference necessarily to be drawn from the foregoing reasoning, but it appears to us the plain import of Petitioner's repeated suggestions to the effect that the Commis-

53. Under date of May 4, 1953, the Commission issued Release No. 1862 under the Investment Company Act of 1940, announcing the transfer to its former Division of Public Utilities of certain functions previously performed by other divisions and the renaming of that Division as "the Division of Corporate Regulation". Explaining the reasons for these changes, the Commission's statement said:

> "The transfer also is a recognition that the Section 11 (integration and simplification) program under the Holding Company Act has been substantially completed."

54. 202 F. 2d at p. 639.

sion should not be expected to furnish support in the record or otherwise for its determinations as to fees, no matter how prejudicial.[55]

We are at a loss to understand on what basis Petitioner ventures to claim for this administrative agency dictatorial and non-reviewable powers in matters affecting property rights and, indeed human rights, of such substantiality. The Commission in the Courts below did not venture to advance claims of such a character; on the contrary, when it initiated the present proceedings in the District Court for enforcement of its ruling concerning Masterson, its application asserted:

> "[T]his Court has full jurisdiction to review said determination of the Commission and to pass upon the fairness of the provisions of said plans relating to the denial of payment of fees to the aforesaid claimants." (R. 13a)

As has been shown, it was on the basis of this and related allegations that the SEC procured from Judge Leahy an order enjoining Respondent from instituting any proceedings "in this or any other forum" seeking judicial relief from the SEC's Order denying payment of the fee agreed upon with his client.[56] It seems little short of ironical that Petitioner should now contend that to accord to Respondent normal judicial review of the SEC's prejudicial ruling is to

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55. See, for example, Petition, page 18:

> "Since it would usually be *impossible* for the Commission to sustain such a *burden* in an area where there is as much room for reasonable differences of judgment as exists with respect to reorganization fees, the effect of the holding below is to leave the Commission with nominal responsibility for such fees but without any real power to deal with them." (Emphasis supplied.)

Petitioner couples this argument with assertions that the decisions below require it to prove the fee arrangements between the company and its counsel to be "unconscionable", but as we have previously shown, this contention is entirely fanciful.

56. *Supra*, n. 25.

interfere with the Commission's authority to supervise fees in 11(e) proceedings. In essence, Petitioner wishes to create the appearance of affording judicial review of the SEC's rulings, while denying any real substance to such judicial review.

The fee determinations of the District Courts under Chapter X, and under the predecessor Section 77B, of the Bankruptcy Act *have in innumerable instances been increased or decreased by the appellate courts upon review.*[57] If there can be effective appellate review of the fee determinations of these important *judicial* officials, invested by Congress with a specific grant of statutory authority to fix fees in reorganizations which they supervise in minute detail,[58] we cannot understand how it can be claimed that there should not or cannot be effective judicial review of the fee determinations of the SEC, an agency whose personnel frequently play a prosecutory and partisan role in the proceedings with respect to which the fees are applicable, and an agency whose authority to supervise fees under Section 11(e) is drived only by implication.[59]

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57. Thus, in *Newman & Bisco v. Realty Associates Securities Corp.*, 173 F. 2d 609, the Court of Appeals for the second circuit modified, without remand, allowances granted by the District Court, stating that this "follows our usual practice". *In Re Consolidated Motor Parts, Inc.*, 85 F. 2d 579, the same court granted an allowance which the District Court had denied. *In Re Mountain States Power Co.*, 118 F. 2d 405, the Third Circuit sharply increased allowances over those granted by the District Court. *In Re Albert Dickinson Co.*, 104 F. 2d 771, the Seventh Circuit increased allowance, also without remand. See also: *In re Prudence Bonds Corp.*, 122 F. 2d 258 (C. A. 2); *In re Detroit International Bridge Co.*, 111 F. 2d 235 (C. A. 6); *Steere v. Baldwin Locomotive Works*, 98 F. 2d 889 (C. A. 3); *Silver v. Rosenberg*, 139 F. 2d 1020 (C. A. 2); *Milbank, Tweed & Hope v. McCue*, 111 F. 2d 100 (C. A. 4); *Smith v. Central Trust Co.*, 139 F. 2d 733 (C. A. 4). The foregoing citations could be multiplied many fold.

58. See Sections 242 and 243 of Chapter X, 11 U. S. C. §§ 642 and 643.

59. Until the decision of the District Court in the instant case, in none of the many Opinions in which the SEC has discussed its asserted fee jurisdiction in 11(e) proceedings has it suggested that the

(2) Petitioner's contention that the Courts below assumed that the Commission's authority over fees in Section 11(e) proceedings is narrow and restricted, and that Respondent so contended, is devoid of merit. On the contrary, Respondent urged in the District Court that the authority of the Commission to pass on the reasonableness of Respondent's fee should be assumed; and that the sole issue should be whether on the record evidence the Commission had properly and fairly exercised that authority.[60] Whatever difficulties the District Court had in ascertaining the precise source of the SEC's jurisdiction over fees in Section 11(e) proceedings in the face of that section's silence on the subjet, Judge Leahy made clear in both his Opinions that *regardless of how broad such authority might be,* if any reviewing power resided in the Enforcement Court the Court felt impelled on the facts of record in this case to hold that Masterson was entitled to his fee, specifically found to be "fair and reasonable". When an *amicus* sought to argue that the SEC in fact did not have authority to pass on the fees of company counsel in 11(e) proceedings, the District Judge rejected the argument as "not in the

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jurisdiction granted by Section 11(f) with respect to insolvent companies could be thought to confer fee jurisdiction in the fundamentally different proceedings under 11(e). See discussion *infra* at page 37 as to the Commission's express recognition of the fundamental differences between 11(e) proceeding and the reorganization of an insolvent company under 11(f) or under the Bankruptcy Act. For purposes of Section 11(e), the Commission has attempted to rely on what it has described as "inherent equity jurisdiction," buttressed by references to its supervisory authority under other sections of the Act with respect to fees in connection with security issues and acquisitions.

The Commission's most comprehensive discussion of its fee jurisdiction is set forth in *Engineers Public Service Co.,* H. C. A. R. No. 7041, which does not mention Section 11(f), and which reasons that there must be an *implied* equity jurisdiction in the Commission under 11(e) to allow fees.

60. "We would not wish the rights of Masterson to receive the fair and modest compensation which Light and Power has agreed to pay him, to turn on any mere jurisdictional issue". (Brief in Reply to Petition for Rehearing in District Court, page 2.)

case", and an issue which the *amicus* would not be permitted to "engraft".[61] In effect, the Court made clear that even if the SEC had been given the same express and broad grant of statutory authority to fix fees in 11(e) proceedings that the District Judges have in Chapter X proceedings, "I still would have review power—which the SEC concedes—and *in the factual context here,* would exercise such review power to allow for the additional compensation sought by Masterson and agreed upon by his client, the North American Light & Power Company".[62] (Emphasis added.)

However, Petitioner argues that the Enforcement Court in connection with Section 11(e) plans "lacks that direct contact with the activities upon which fee claims are based which it acquires through the exercise of its primary jurisdiction to approve plans in a Chapter X proceeding".[63] If the implications of this argument were valid, they would entirely rule out any appellate review of the fee determinations of the District Judges under Chapter X and indeed would also eliminate virtually *all* judicial review of the determinations of administrative agencies, since the latter are almost always in a postion to claim "first-hand knowledge" because the record of the proceeding was made before them.

Under applicable principles of law, the members of the Commission are required to make their determinations on the basis of the evidence of record, and that same record was before the Enforcement Court when it reviewed the Commission's determination. Any suggestion that the Commissioners who denied Masterson's fee themselves had *first-hand* knowledge of the nature, extent or quality of Masterson's services is baseless. Whereas Masterson commenced rendering his services in June, 1943 and the record in the Plan 1 proceedings was substantially completed in

61. 106 F. Supp. at p. 687.
62. Ibid.
63. Petition, p. 20.

1946, an inspection of the Annual Reports of the Commission to Congress establishes that the name of none of the three Commissioners who rendered the decision as to Masterson is listed as a member of the Commission prior to the Annual Report for 1946. In the Annual Report as of June 30, 1946, one of the Commissioners is listed for the first time. In the 1947 Report a second is listed, and in the 1948 Report the third is named.

In contrast, it may be noted from the numerous citations to the Federal Supplement which are contained in the record of this proceeding that Judge Leahy, the Enforcement Judge, is the one figure who has remained constant in his familiarity with this extensive proceeding from the very beginning. It is difficult to comprehend an argument which seeks to cast upon this highly experienced Judge a purely rubber-stamp role in the proceeding and to clothe a shifting personnel [64] with what amounts, according to the argument made, to virtually non-reviewable jurisdiction.

It is further to be observed in this connection that whereas the Enforcement Judge is a wholly judicial person, the members of the Commission are quasi-judicial persons only. The Commission in some respects is itself a litigant and, as such, it was the Respondent here who

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64. For example, it may be noted that two of those three gentlemen who issued the decision are no longer connected with the Commission. Before their departure, a special Congressional Committee expressed its concern with the rapid turn-over among SEC personnel stating:

> "Only 7 of the 26 members appointed to the Commission have served for a period of at least 5 years. The average term of the present Commissioners is 35 months. * * * We do not look with favor upon the rapid turn-over of Commissioners, especially when shortly after their resignation they return to practice before the very agency whose laws they sought to administer". (Final Report of the Securities and Exchange Commission Subcommittee to the Committee on Interstate & Foreign Commerce, House of Representatives, 87 Cong. [1952] p. 125.)

brought it into the Court of Appeals to seek to prevent the "claim-over" proceeding as being premature and out of place at that stage of the proceedings. The feelings between a litigant and counsel opposing him are not always the friendliest. That the litigant should be clothed with virtually unreviewable authority in the fixation of his opponent's fee could hardly have been the intention of Congress.[65]

(3) In view of the unblinkable possibility that some persons connected with an agency frequently placed in a partisan role might be led to favor or discriminate against fee claimants on the basis of personal considerations or those related to the earlier controversies, and in the light of the charges of favoritism which have in fact been leveled against this very agency,[66] it might be thought that Peti-

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65. During the proceedings, there were on occasions sharp disagreements between Respondent and the members of the Commission's staff (Division of Public Utilities) actively engaged in the proceedings, who were clearly partisan to Condon and against Masterson and Kline on the issue of the "claim-over". Although most of these staff members had left the Commission by the time the fee applications were presented, their colleagues in the Division of Public Utilities filed with the Commission the formal "Recommended Decision" urging that Masterson's request be denied (R. 54a) which recommendation the Commission adopted. At the same time the Division recommended the allowance to Condon of a counsel fee of $400,000 for his services in the inconclusive claim-over proceedings, "the largest single fee we have ever awarded to any representative of security holders in a Section 11(e) proceeding and . . . larger than any such fee we have recommended in proceedings under Chapter X of the Bankruptcy Act . . ." (R. 44a). This recommendation was also adopted by the Commission precisely as submitted by the Division (R. 58a).

66. Thus Senator Paul Douglas (Cong. Rec., Feb. 25, 1952, pp. 1318-19):

> "While no illegal or dishonest actions were revealed on the part of Mr. McDonald or other SEC members, the favorable results of the cases involving these brokers who were represented by ex-Chairmen of the SEC lends color to the suspicion of an unusual advantage not clearly warranted by the facts of the

tioner would *welcome* a searching judicial review of the agency's fee determinations, rather than the contrary. Instead, however, it is here contended that the Commission's regulatory jurisdiction has been "frustrated" by the decisions of the two eminent Courts below because the Commission's determination has not prevailed with respect to a $10,000 fee, out of total allowances authorized by the Commission in this proceeding aggregating $2,270,650 (Petition, p. 9).

Petitioner's assertions that it is the desire of Congress for the SEC to be clothed with administrative absolutism in granting or denying fees strike particularly strangely, we submit, against this Court's admonition that:

> "[T]the Administrative Procedure Act and the Taft-Hartley Act direct that Courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some Courts have shown in the past. Reviewing Courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them the

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cases. * * * The question naturally arises whether to place in the position of head of RFC a man against whom the charge of favoritism has been made. Whichever way he may decide the question, Mr. McDonald will be on the spot. Only the strongest sort of person should be placed in that position."

Cf. Congressman George Bender, Chairman of the Public Accounts Subcommittee of the House Committee on Government Operations, recently quoted in the Commercial and Financial Chronicle of June 11, 1953 (page 56, col. 1) as follows:

> "First, said Mr. Bender, he wants to inquire into 'numerous complaints' he said, that the SEC is playing favorites. He hears, Mr. Bender said, that SEC tends to 'play favorites with its friends and do things which creates a stench against persons unfriendly to the Commission * * * they make the climate healthy for their friends and unhealthy for their enemies.'"

Cf. also, Final Report of the Securities and Exchange Commission Subcommittee to the Committee on Interstate & Foreign Commerce, House of Representatives, 82 Cong. (1952) pp. 117-125.

> responsibility for assuring that the Board keeps within reasonable grounds." [67]

Moreover, there is surely no room for a contention in this case that the administrative determination at issue related to "a specialized field of knowledge, whose findings within that field carry the authority of an expertness which Courts do not possess and therefore must respect." [68] In contrast with the District Judge's intimate and expert familiarity with the subjects of litigation procedures and attorneys' services and fees related thereto,[69] members of the SEC need not be lawyers—and of those who are, it is a matter of common knowledge that many have had relatively little, if any, practical legal experience outside of their administrative posts. Thus, the Chairman of the SEC at the time of the Commission's decision in the instant case, who was one of the three commissioners participating therein, was a non-lawyer who was a former securities dealer at the time of his appointment.[70] It is difficult to perceive that this calling conferred special "expertise" for the particular function under discussion, bearing in mind that the Commission's denial of Respondent's fee turned largely on the purported assessment of such evidentiary factors relating to trial procedure and technique as that Kline played the more articulate role in the hearing room when both company counsel were present, that Respondent was "subordinate" to Kline

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67. *Universal Camera Co. v. Labor Board,* 340 U. S. 474, 490. While the foregoing language was directed specifically to the Labor Board, the Court stated at page 487:

> "And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act."

68. Id. at p. 488.

69. There is no need to expatiate on the breadth of the District Judge's experience in fee matters, not only in connection with Chapter X and other reorganization statutes, but in a wide variety of other equity and statutory proceedings which come before him from day to day. Cf. the District Court's Opinion at R. 77a-78a.

70. Congressional Record of July 25, 1952.

and that therefore Respondent's services were "duplicative".[71]

(4) In sharp contrast with Petitioner's professed consternation at the notion of according weight to an arm's-length agreement between a holding company and its counsel which Petitioner does not even suggest is unreasonable or unfair,[72] the SEC has filed a brief in another case presently pending in the District Court wherein the Commission vigorously asserted that Congress has charged the *managements* of holding companies with broad responsibilities in reorganizations, under Section 11(e), *and that the management's discretion in the exercise of those responsibilities should be recognized, subject only to supervision against abuse.* In that brief, the Commission draws a sharp distinction between the authority of the managements in the reorganization of insolvent companies under the Bankruptcy Act, and its responsibilities in effecting a plan of voluntary compliance for a solvent holding company under Section 11(e). The Commission states:

> "In providing for the reorganization of solvent companies in order to carry out the policy of Section 11, Congress did not see fit to displace existing managements to an extent at all comparable to that which has been deemed expedient in dealing with insolvent companies pursuant to Chapter X of the Bankruptcy Act * * *

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71. R. 67a, cf. the District Court's Opinion at R. 80a. In this context, the statement of the Ninth Circuit with respect to a comparable attempted assessment by the Commission of the fiduciary standards applicable to an attorney, is apt:

> "If any 'expertise' was involved it belonged to the district judge because of his familiarity with the ancient standards of proper fiduciary conduct as long established in the courts of equity. * * * We think it manifest that the district judge knew more about the subject in hand than did the Commission. We think the trial judge applied the sound rule." (*SEC v. Cogan*, 201 F. 2d 79, 86)

72. See, for example, Petition, page 18, note 10.

> "But a Section 11(e) reorganization . . . differs from a Chapter X or equity receivership reorganization in that until approval of the plan the management continues to function as representatives of its security holders. *The Congress charged it* [the holding company management] *with specific responsibilities to make decisions on behalf of the security holder interests and its discretion in the exercise of these responsibilities should be recognized, subject to Commission supervision designed to check the recognized risk that such powers might be abused.*" [73] (Emphasis supplied.)

This Court, also, has emphasized the important responsibilities which Congress has vested in the managements of holding companies in connection with the formulation and prosecution of plans under 11(e), stating:

> "The Act vests in the officers and directors of a holding company registered under the Act broad powers as representatives of all the stockholders. Besides the Commission, only the management can initiate a proceeding before the Commission to simplify the corporate structure and to effect a fair and equitable distribution of voting power among security holders. Only the management can amend a plan under §§ 7 and 11(e), and this it may do at any time; only the management can withdraw the plan, and this too it may do at will; and even after the Commission has approved a plan, it cannot be carried out without the consent of the management." [74]

Similarly, in his concurring opinion in *American Power & Light Co. v. SEC,* Justice Rutledge made clear that the

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73. Memorandum of the SEC dated July 1952 filed with the District Court of Delaware in the fee application proceedings in *Matter of Engineers Public Service Company,* Civil Action No. 995 (pages 7, 9).

74. *SEC v. Chenery Corporation,* 318 U. S. 80, 91.

primary purpose of Congress in enacting Section 11(e) was not to achieve financial reorganizations, as is the case in reorganizations under the various sections of the Bankruptcy Act, but to encourage and enable the managements of holding companies to formulate and present voluntary plans of *compliance* with the vital integration and simplification requirements which are embodied in Section 11(b). Thus, Justice Rutledge stated:

> "Both the terms of the Act and the legislative history show that the purpose of § 11(e) was to allow companies affected 'to work out a plan of reorganization to make unnecessary the issuance of an involuntary order for its reorganization . . .,' which could only be issued under § 11(b)".[75]

Congress having thus intended that under Section 11(e) the managements of holding companies should receive a substantial degree of latitude and encouragement to formulate and present voluntary 11(e) plans of compliance to effectuate the purposes of Section 11(b), it is difficult to believe that Congress intended that these companies should be precluded from retaining counsel of their own choice and agreeing to pay them for such services a reasonable compensation.[76] Since the Enforcement Court found on the basis of the facts of record the compensation agreed to between Masterson and his client to be "fair and reasonable" (R. 86a), and Petitioner does not even venture to suggest it is not,[77] there is obviously no merit whatever

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75. *American Power & Light Co. v. SEC*, 329 U. S. 90, 123.

76. It is to be noted that, to our knowledge, the Commission has never even claimed it has the right to pass on the compensation which holding companies pay counsel for representing them in proceedings under Section 11(b) of the Act.

77. Petition, p. 18, note 10:

> "We do not argue that the company's agreement to pay Masterson $150 a day rather than $100 a day which the Commission found his services to be worth was so improvident as to amount to waste, since the Commission made no such finding.

to Petitioner's argument that giving effect to this agreement would "frustrate" the Congressional intention. Indeed, if the foregoing standard *asserted by the Commission* is correct, to the effect that Congress intended that the management's "discretion in the exercise of its responsibilities should be recognized" subject only to check against abuse, it might be contended that it is essential that such an agreement be given effect in order to comply with the Congressional intent.

B. The Decision Affirmed Below Properly Applied the Substantial Evidence Rule.

In the light of the factors discussed above and others discussed in its Opinions, the Enforcement Court concluded that the evidence fully established the fairness and reasonableness of the attorney-client agreement for Respondent's compensation, and furnished no substantial support for the Commission's nullification of that agreement or for its purported allowance to Respondent of "compensation" which did not even suffice to cover his office overhead charges.[78] We are confident that any judicial tribunal would inevitably reach the same conclusion if it canvassed "the record as a whole", as Judge Leahy did and was required to

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Nor do we argue that an award of the larger amount ordered by the district court would be an abuse of discretion if the district court were authorized by the statute to approve fees as such, rather than to exercise judicial review over the approval action of the Commission."

78. Even Appellant has not ventured to question the correctness of this finding. Assuming that an attorney's annual productive work-year comprises 250 days, on the basis of 5 days per week for 50 weeks (which many attorneys would regard as excessive), the $35,000-$40,000 annual overhead would be equivalent to from $140-$150 per day. To be sure while Masterson was engaged in rendering his services to Light & Power his assistants were presumably also engaged in productive activity, but as in any law office the chief burden of meeting the overhead charges must necessarily be carried by those cases to which the senior partners are required to devote themselves personally.

do.[79] We would welcome the Court's undertaking that task if it wishes in connection with the present Petition, but under the standards of appellate review laid down by this Court in connection with its decisions under the Administrative Procedure Act, we doubt that the Court will wish to perform that task (already performed by two Courts) or to attempt to re-assess the evidence *de novo*.

In discussing the respective judicial roles which Congress intended to entrust on the one hand to the enforcement court in reviewing the determinations of an administrative agency, and on the other hand to the appellate court which reviews the conclusion of the enforcement court, this Court stated:

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Court of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." (*Universal Camera Co. v. Labor Board*, 340 U. S. at p. 491.)

In a companion decision issued simultaneously, the Court elaborated on the foregoing by stating:

> "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders." (*Labor Board v. Pittsburgh Steamship Co.*, 340 U. S. 498, 502.)

And more recently still this Court once again reemphasized this principle, stating:

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79. *Universal Camera Co. v. Labor Board, supra*, note 67.

> "Last term we made it plain that Congress charged the Courts of Appeal, not this Court, with the normal and primary responsibility for reviewing the conclusions of the Board. We stated that this Court 'is not the place to review a conflict of evidence nor to reverse a Court of Appeals, because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.' *Labor Board v. Pittsburgh S. S. Co.* . . . We repeat and reaffirm this rule, noting its special applicability to cases where, as here, a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case." (*Labor Board v. American Ins. Co.*, 343 U. S. 395, 409-410.)

In the instant case the District Court has been entrusted by Congress with the role of enforcement court analogous to that which the Court of Appeals occupied in the cases from which the foregoing quotations are taken. Even with due regard for the differences between the relationships of the Courts at each of the levels in the hierarchy, we think the principle of appellate review enunciated by this Court makes it clear that the determination of the District Court in this case should not be disturbed, unless this Court finds (that which the Court of Appeals concluded was not the case) that the enforcement court's decision has "misapprehended or grossly misapplied" the standard of "substantiality of the evidence on the record as a whole". As this Court recently emphasized, this principle has particular force in a situation such as this, where, assuming supervisory authority does exist, the question whether the attorney-client arrangement violated the statutory standard that an 11(e) plan be "fair and equitable", can only be determined "in its application to the particular facts of a particular case".

Moreover, we suggest that the principle discussed above takes on even further force in this case where the determination has been made by an enforcement court possessed not only of long and intimate familiarity with the particular proceedings, but which is also widely recognized as the most expert enforcement court in the country in relation to the particular statute under which the proceedings arose;[80] and its determination was thereafter reviewed and affirmed by the appellate court which the Commission itself has referred to as "the court of appeals most experienced in Holding Company Act problems".[81]

Respectfully submitted,

E. Ennalls Berl,
948 Delaware Trust Building,
Wilmington, Delaware,
Attorney for Respondent.

Dated: August 19, 1953.

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80. See Note, 59 Yale Law Journal 1365 (at p. 1369):
"The outstanding example of an expert district judge is Judge Leahy of Delaware, who has reviewed 42% of all 11(e) plans submitted for district court approval. * * * And his decisions on acceptability of plans have been highly respected by both appellate courts and the S. E. C."

81. SEC. Brief filed in the U. S. District Court for the Southern District of New York in the proceeding reported in *Re Electric Bond and Share Company*, 95 F. Supp. 492.

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 111

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

JAMES F. MASTERSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY OF SECURITIES AND EXCHANGE COMMISSION, PETITIONER, TO BRIEF IN OPPOSITION

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1. Respondent suggests that there is no general importance to the problem of the Commission's powers with respect to fees, or the scope of judicial review thereof, because the program of corporate simplification directed by the Holding Company Act has been substantially completed (Br. in Opp., pp. 27-28). However, this progress toward completion of the simplification program has brought to the fore the questions involved in evaluating the

services rendered in the reorganization proceedings.

Since June, when the petition was filed, additional applications for compensation totalling approximately $5,750,000 have been filed with the Commission. During this period, the Commission has acted upon approximately $3,500,000 of claims. The total amount of fee claims pending before the Commission is now approximately $10,500,000,[1] including claims of persons retained by companies subject to regulation amounting to approximately $2,500,000. There are now seven fee cases pending in the lower courts involving review of Commission allowances in Section 11(e) proceedings.

2. Respondent disputes the Commission's statement of the questions presented, and argues that this case presents no more than a holding by the courts below that, on the basis of the particular facts, the Commission acted arbitrarily. We recognize that both courts below expressly relate their holdings to the facts of the case. But, as stated in the petition, the one "fact" stressed by the District Court—in what the Court of Appeals concluded to be a proper exercise of its review jurisdiction—was the holding company client's opinion as to the worth of Masterson's services, to which the Commission was required to give "full weight." There was no judicial finding, and we believe no record basis, for concluding that, if the Commis-

[1] This figure does not include applications for reimbursement of expenses totalling approximately $475,000.

sion was authorized to perform the primary act of valuation and judgment with respect to the worth of these services, it could not rationally have arrived at the amount allowed by it, or indeed at any intermediate sum less than that to which the management and Masterson had agreed.

The brief in opposition appears to us to confirm our own analysis of the holdings below, as denying to the Commission the customary authority of other first instance reorganization tribunals with respect to fees, and leaving it without effective control thereof. That the Commission lacks power to determine fees within the area where there is room for reasonable differences of judgment is a premise which underlies respondent's factual argument. The very statement of the gist of the District Court's holding assumes that it is management rather than the Commission which has primary responsibility for judgment in this area. Thus it is stated (p. 16) that the District Court held no more than that "the specific agreement . . . was arbitrarily brushed aside by the SEC in the face of the record evidence establishing both the fairness and the reasonableness of the agreement." This argument does not really join issue with the Commission in view of its concession in the court below (quoted in the petition, p. 18) that the Commission did not claim that it would be improvident for management to agree, or an abuse of discretion for the District Court to approve, the sum allowed, if either had primary power to exercise discretion with respect to the fee.

Much of respondent's factual argument is irrelevant to the precise question at issue, and goes to show merely that the Commission properly awarded Masterson some fee, not that it lacked a reasonable basis for judgment that an appropriate fee was lower than that which management was prepared to pay. Thus, respondent argues (p. 16) that the court below properly concluded that under the circumstances "it was in the best interest of Light and Power to be represented by more than one attorney." The Commission, of course, did not act on any inconsistent hypothesis. Again, respondent relies (p. 18) upon the combined contribution of Kline and Masterson to the proceeding, but points to no finding by the District Court that the total amount the Commission allowed to both Kline and Masterson was inadequate or that the Commission exceeded the limits of rational judgment in estimating the relative contributions of Kline and Masterson. Respondent argues further that the level of compensation which the enforcement court directed to be paid him "was reasonable and indeed modest in relation to the scale of attorneys' compensation which the SEC itself" allowed other counsel. But respondent does not undertake to show any basis for concluding, nor suggest that the District Court concluded, that the Commission was unreasonable in its allowance of approximately $2,000,000 for the total of lawyers' fees in the reorganization. Nor did it direct a reallocation as between Master-

son and other counsel. The possibility, insinuated by respondent, that the Commission may have been guilty of what is sometimes referred to as "vicarious generosity" in its award to other fee claimants, hardly makes it a proper exercise of the district court's review function to engage in a similar generosity for respondent's benefit. Indeed there is no suggestion in the District Court's opinion that it relied on such considerations except to show that the Commission was not on firm ground in differing with management.

Respondent also tenders, as a factual argument, various reasons why the managements of the companies concerned and the District Court were better qualified than the Commission to judge the worth of his services, viz., "the managements . . . had an intimate first-hand knowledge of Masterson's services rendered without as well as inside the hearing room" (p. 18). It is further argued that a judicial person is inherently better qualified to determine the worth of lawyers' services than a quasi-judicial person which in some respects is itself a litigant (p. 33); that the Commission, and its staff, are more likely to be impressed with lawyers who argue in accordance with than in opposition to their own views (p. 34); that "charges of favoritism" have been leveled at the Commission; that any claim on the Commission's part to exercise authority over fees within the area where there is room for reasonable differences of judgment is a claim to "dictatorial

and non-reviewable powers" (p. 29);[2] that a commission whose members are not necessarily lawyers cannot be expert as to fees, while the district judge here involved was particularly expert.

Some of these arguments find their parallel in that portion of the District Court's initial opinion which deprecated the Commission's ability to reach a conclusion as to the "duplicative and secondary character of the services" rendered by Masterson (R. 79), and characterized as "avowed paternalism" and not in accord "with legal standards" the Commission's unwillingness to accept management's judgment. We find no suggestion in the District Court's opinion, however, that it claimed for itself any special qualifications to exercise a direct and informed judgment as to the worth of Masterson's services. The Court relied on its own experience only to conclude that Masterson, as additional counsel might have rendered more valuable services than was apparent from anything that appeared in the record of the reorganization, and that therefore the Commission was not warranted in rejecting the company's

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[2] *Cf. Reconstruction Finance Corp.* v. *Bankers Trust Co.*, 318 U.S. 163, at p. 170, where it is stated concerning the respective functions of Commission and court in passing upon railroad reorganization fees:

> Our conclusion is that the function committed by the law to the Commission is the ordinary one reposed in a fact finding body and that its findings, supported by evidence, may not be disturbed by a court. This construction of the Act leaves the court free to decide upon the basis of the Commission's report all questions of law. With respect to the amount set as a maximum the only question of law which can arise is whether there is substantial evidence to support the Commission's finding.

judgment. Both the reasoning of the District Court, and the exact coincidence between its directions to the Commission on remand and the agreement, show that it did not attempt to exercise the primary judgment as to the worth of the services which was denied to the Commission. Thus, as we argue more fully in the petition, the decision denies the Commission real powers of regulation with respect to reorganization fees without substituting judicial regulation of the type exercised in Chapter X proceedings.

3. Respondent's brief (pp. 37-40) refers to Commission and court comment on the powers and responsibilities of management in Section 11 proceedings. All of the citations, however, deal with the exclusive power of the management, *vis-a-vis* individual security holders, to initiate proceedings and submit proposals. None of them suggests any special weight to be given to management valuations, whether of securities or of services. The latitude of the regulated companies in formulating and presenting plans, and in retaining counsel of their own choice, is no limitation on the power and duty of the Commission to determine independently the fairness of the plans and the value of the services rendered. It is the Commission's valuation findings, not those of the regulated companies, which are to be upheld by the courts if supported by substantial evidence. *S.E.C.* v. *Central-Illinois Securities Corp.*, 338 U.S. 96, 125.

4. Respondent urges that the decision below cannot be interpreted as denying the Commission

effective control of fees to the extent agreed to by a holding company client, because in *Matter of Public Service Corporation of New Jersey,* Holding Company Act Release No. 12,000, the Commission did not construe the decision "to mean that this Commisson cannot determine the amount of a reasonable fee to be less than that agreed to by the company and its counsel." The brief in opposition omits the fact that the company counsel have pending in the Third Circuit a petition to review the ruling of the Commission reducing their fee from $150,000 to $125,000.

One of the major problems created by the decisions below is their impact on the review process. They constitute an invitation to fee claimants to challenge, and to the reviewing courts to upset, any decision of the Commission allowing less than the amount which a management has agreed to pay, unless the Commission can sustain the burden of proving that the agreed amount is unreasonable, unfair, excessive, or arbitrary. The effectiveness of the Commission's regulation of fees in Section 11 reorganizations depends not only on the Commission's treatment of agreements between regulated companies and their counsel, but more importantly upon the standards applied by the reviewing courts in determining whether to uphold or to disregard the Commission's judgment. The problem is well illustrated in the *Northern States* case.[3] There the enforcement court, in an

[3] *In re Northern States Power Company* (unreported), D. Minn., Civil Action No. 2673, January 12, 1953, pending on appeal, C.A. 5.

opinion reflecting essentially the views of the District Court in the instant case, rejected the Commission's fee allowances as inadequate in four instances where the Commission had allowed less than the amounts the companies in reorganization had undertaken to pay, and with respect to company counsel directed payment of the precise amounts approved by the companies. In discussing the claims of one of the company counsel, the Court commented that the fees claimed "cannot be characterized as being so unreasonable that good conscience requires their denial." This is essentially the test applied by the District Court and affirmed by the Court of Appeals below, and which the Commission is now testing on appeal in the *Northern States* case.

5. In the case below, as in substantially all of the pending litigation on fees in Holding Company Act reorganizations, the claims of company counsel are considered by the managements of the companies in reorganization, by the Commission, and frequently, in the event of a difference of judgment between them, by the reviewing court. As we read the Act and its legislative history, the statutory scheme contemplates that the Commission's evaluation of the services rendered shall prevail, unless that judgment is shown to be arbitrary and not supported by substantial evidence. The decisions below require the Commission to demonstrate that the more generous appraisals of man-

agement are unreasonable, in order for its judgment to prevail. This is an important issue in the administration of the Act, and should be reviewed by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 111.

October Term, 1953.

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

JAMES F. MASTERSON,
Respondent.

RESPONSE TO REPLY OF SECURITIES AND EXCHANGE COMMISSION

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RESPONSE TO REPLY OF SECURITIES AND EXCHANGE COMMISSION

In its Reply Brief, Petitioner continues the process commenced in its Petition, of attempting to obtain *certiorari* in this case on the basis of its contentions as to issues presented by the *Northern States* and other cases pending undecided before various lower courts. We have heretofore commented on this extraordinary procedure, and have also pointed out that such cases are in a great many significant respects dissimilar to the case at bar.[1] If those cases actually do present the issues on which Petitioner seeks to have this Court pass, that constitutes no justification for requesting the Court to pass upon them *anticipatorily* in the instant case, where such issues are not in fact presented and the facts are very different.

Petitioner persists in its attempt to manipulate the decisions of the Courts below into a holding that arms-length compensation agreements between companies and their counsel may not be overridden unless the Commission has succeeded in "demonstrating" that the agreement is unreasonable. It may be that there is a good deal to be said in favor of such a doctrine, if due regard be given to the particular nature of Section 11 (e) proceedings;[2] but such was *not* the holding of the Courts below in this case.

In the case at bar, the Enforcement Court regarded the managerial judgment as one evidentiary factor to be considered, but it examined and assessed that evidentiary factor *in the light of the record evidence as a whole.*[3] As the Court of Appeals stated upon its own consideration of the record, made in the light of Petitioner's contentions similar to those here presented, the holding of the Enforcement Court was merely that the SEC'S determination "was not just and reasonable . . . *in all the circumstances of this case.*"[4]

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[1]Brief in Opposition, pp. 21-27.

[2]Indeed, as we have previously pointed out, this is virtually the doctrine enunciated by the SEC itself, in its brief before Judge Leahy in the *Engineers* case; Brief in Opposition, pp. 37-39.

[3]See Brief in Opposition, pp. 16-21.

[4]202 F 2d at p. 639 (emphasis supplied).

It is thus evident that what Petitioner really seeks is that this Court should now override or discard those principles of appellate review several times enunciated and reaffirmed during the last several terms, that:

> "[C]ongress charged the Courts of Appeal, not this Court, with the normal and primary responsibility for reviewing the conclusions of the Board . . .
> [T]his Court is not the place to review a conflict of evidence nor to reverse a Court of Appeals, because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way . . . We repeat and reaffirm this rule, noting its special applicability to cases where, as here, a statutory standard such as 'good faith' *can have meaning only in its application to the particular facts of a particular case.*" (*Labor Board v. American Insurance Co.*, 343 U.S. 395, 409-410; Emphasis supplied)

We submit that this does not present a meritorious issue which justifies issuance of *certiorari*, or the imposition of further delay and expense on respondent.

Dated: October 2, 1953

Respectfully submitted,

E. ENNALLS BERL,

Attorney for Respondent